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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1110

EASTERN KENTUCKY WELFARE RIGHTS ORGANIZATION, ET AL.,
Petitioners
v.
WILLIAM E. SIMON, SECRETARY OF THE TREASURY, ET AL.,
Respondents

No. 74-1124

WILLIAM E. SIMON, SECRETARY OF THE TREASURY, ET AL.,
Petitioners
v.
EASTERN KENTUCKY WELFARE RIGHTS ORGANIZATION, ET AL.,
Respondents

On Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE PETITIONERS IN NO. 74-1110

MARILYN G. ROSE
JOSEPH N. ONEK
CENTER FOR LAW AND SOCIAL POLICY
1751 N Street, N.W.
Washington, D.C. 20036
202/872-0670

Attorneys for Petitioners in No. 74-1110

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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BRIEF FOR THE PETITIONERS IN NO. 74-1110 [1]

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[1] This Court granted cross-petitions for writs of certiorari and ordered the consolidation of the cases. The parties have agreed that Plaintiffs (petitioners in No. 74-1110 and respondents in No.

OPINIONS BELOW

The opinion of the Court of Appeals (Pl. Pet., pp. 7a-32a)[2] is reported at 506 F.2d 1278. The memorandum opinion of the District Court (Pl. Pet., pp. 33a-57a) is reported, *sub nom. Eastern Kentucky Welfare Rights Organization, et al.* v. *Shultz, et al.*, at 370 F.Supp. 325. An additional memorandum order (Pl. Pet., pp. 58a-60a) and the Judgment (Pl. Pet. pp. 61a-63a) are unreported.

JURISDICTION

The judgment of a divided Court of Appeals for the District of Columbia Circuit, reversing the District Court, was entered on October 9, 1974. A timely petition for rehearing was denied, with dissent (Pl. Pet., 6a), as was the suggestion for rehearing *en banc*, with three dissents, on December 6, 1974 (Pl. Pet., pp. 1a-5a). On application filed by the Solicitor General, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 8, 1975. Plaintiffs' petition was filed on March 6, 1975. Defendants' petition was filed on March 8, 1975. Both petitions were granted and the cases consolidated on May 19, 1975. The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

(1) Whether defendants have violated the Internal Revenue Code by the issuance of a ruling eliminating the long-standing requirement that non-profit hospitals

74-1124) in a single opening brief would address the issues raised by both writs, and the opposing parties would each file single responsive briefs also addressing the issues raised by both writs. For convenience, hereinafter petitioners in 74-1110 will be called "plaintiffs" and petitioners in 74-1124 will be called "defendants".

[2] Citations to "Pl. Pet." refer to the appendix to plaintiffs' petition.

accept patients unable to pay as a condition for retaining the status and benefits accorded to "charitable" institutions under the Internal Revenue Code (26 U.S.C. §§ 501 (c) (3) and 170(a)-(c));

(2) Whether defendants, in issuing rules which have a substantial impact upon an industry and a large segment of the public, and which alter the long-standing legal obligation of that industry to that segment of the public, must follow the rule-making requirements of the Administrative Procedure Act (5 U.S.C. § 553);

(3) Whether defendants could issue a ruling which eliminates the legal obligation of "charitable" tax exempt hospitals to accept patients unable to pay without considering all relevant factors, including the impact upon the ability of millions of poor persons to obtain hospital services, and the policies and views of Congress and the health agency of the United States which continue to require that nonprofit hospitals serve the indigent;

(4) Whether the federal courts lack jurisdiction to consider the above issues by reason of the limitations in the anti-injunction provisions of the Internal Revenue Code (26 U.S.C. § 7421(a)), the tax exception to the Declaratory Judgment Act (28 U.S.C. §§ 2201-2202), and the doctrine of sovereign immunity.

STATUTES AND REGULATION INVOLVED

The pertinent provisions of the Internal Revenue Code (26 U.S.C. §§ 501(c)(3), 170(a)-(c), and 7421), the Administrative Procedure Act (5 U.S.C. 553 and 706(2)(A)), the Declaratory Judgment Act (28 U.S.C. § 2201), and the pertinent provisions of the treasury regulation (26 CFR 1.501) are set forth in an appendix to this brief, *infra*, pp. 1a-5a.

STATEMENT OF THE CASE

I. FACTS

The Internal Revenue Code (hereinafter "the Code"), since its inception, has provided tax exemption for the income of, and subsequent amendments have permitted donors to deduct contributions to, certain organizations categorized as "charitable". (See current provisions, 26 U.S.C. §§ 501(c)(3) and 170(a)-(c), *infra*, pp. 1a-2a). Other organizations categorized as "educational" and "religious" have always been accorded the same benefits as "charitable" organizations, and "scientific" and "literary" organizations and societies for the prevention of cruelty to children and animals subsequently have been granted similar treatment by Congress. On the other hand, nonprofit hospitals and other nonprofit health institutions have never been granted the same independent special tax status under the Code but have only qualified for such tax benefits if they fit into the "charitable" category. On two occasions amendments were proposed in Congress which would have accorded health institutions (in 1924) and hospitals (in 1969) favorable tax status independent of the "charitable" category, but on both occasions the attempt failed.

Prior to October 8, 1969, the long-standing policy of the Internal Revenue Service (hereinafter "IRS") required that a nonprofit hospital in order to be qualified as charitable under the Code,

> ". . . be operated to the extent of its financial ability for those not able to pay for the services rendered and not exclusively for those who are able and expected to pay . . . [and]
>
> . . . not refuse to accept patients in need of hospital care who cannot pay for such services. . . ." Rev. Rul. 56-185, 1956-1 Cum. Bull. 202.[3]

[3] Revenue Ruling 56-185 is set forth in full *infra*, pp. 6a-10a.

While recognizing that nonprofit hospitals must charge those able to pay for service in order to meet the operating expenses of the institution, IRS required that "charitable" hospitals not deny medical care and treatment to others unable to pay. This policy was in accord with the legislative history of the relevant Code provisions and the long established definition of "charitable" as adopted by the federal courts.

On October 8, 1969, defendants issued a policy pronouncement (Technical Info. Rel. No. 1022), later issued as a published revenue ruling (Rev. Rul. 69-545, 1969-2 Cum. Bull. 117)[4] which removed the requirements set forth in Revenue Ruling 56-185 and prior case law that nonprofit hospitals provide care for patients without charge or at rates below cost in order to retain their "charitable" status under the Code. This new policy limited the "charitable" requirements of nonprofit hospitals to the operation of an emergency room and the provision of "hospital care to all those persons in the community able to pay the cost thereof either directly or through third party reimbursement." The ruling, on its face, is totally devoid of any consideration of the needs of indigent persons for general, non-emergency room hospital services or the number of such persons who, by virtue of the ruling, would be deprived of the ability to obtain general hospital services.

Furthermore, the ruling was issued without notice to the public and without any opportunity for the public and interested and affected persons to participate in the rulemaking process in accordance with the procedural requirements of the Administrative Procedure Act

[4] Revenue Ruling 69-545 is set forth *infra*, pp. 11a-16a.

(5 U.S.C. § 553). (App. 149-150).[5] Thereafter, several of the plaintiffs attempted to obtain a reconsideration of the ruling, but defendants rejected this attempt as "irrelevant."[6]

II. PROCEEDINGS BELOW

On July 12, 1971 plaintiffs commenced this action in the United States District Court for the District of Columbia (App. 8-30). Plaintiffs are extremely poor people and organizations representing poor people, with incomes at or below the minimal poverty guidelines and without health insurance or the resources to pay for hospital care. (App. 11-13, 17-24). Their uncontradicted affidavits recount incidents in various locations across the country since 1969 in which they and other indigent persons were denied needed hospital attention because of their inability to pay for services by nonprofit hospitals which refuse to serve persons unable to pay but still retain their status under the Code as "charitable" institutions in accordance with Revenue Ruling 69-545. (App. 78-144).

Plaintiffs alleged that the Commissioner of Internal Revenue and Secretary of the Treasury had violated

[5] Citations to "App." refer to the single appendix filed in the Supreme Court.

[6] Pursuant to a notice of hearing in the Federal Register on proposed regulations covering 26 U.S.C. § 170, the "charitable" contributions provision of the Code, (36 Fed. Reg. 9298), a number of organizations and individuals, including several of the organizational and individual plaintiffs in this case (App. 49-51), filed a statement contending that Revenue Ruling 69-545 was based on a lack of understanding of the needs of poor people for hospital services and requesting consideration of these problems in prescribing new regulations under § 170. (App. 76-77, 47-75). Counsel for the individuals and organizations appeared at the hearing held on June 28, 1971, but was told,

> ". . . that as I was present I could testify, but to be brief, as the matters which were the subject of my testimony were irrelevant to the purposes of the hearing, and that I was addressing myself to the wrong forum." (App. 77).

the Internal Revenue Code and the Administrative Procedure Act (hereinafter "APA") by the issuance of Revenue Ruling 69-545, which eliminated the requirement that nonprofit hospitals provide services to persons unable to pay in order to retain "charitable" status under the Code, and that subsequent persons serving in the same official capacities have continued those violations, thus depriving plaintiffs and other poor people of their statutory rights to obtain services from nonprofit hospitals. (App. 25-26). Plaintiffs also alleged that defendants violated the APA by failing to follow the rule-making requirements of section 553, thus denying to them their rights to participate in the rule-making process. (App. 26).

Subsequently, the district court denied defendants' Motion to Dismiss, which raised various jurisdictional barriers to the consideration of the Complaint, including the anti-injunction provision of the Code (26 U.S.C. § 7421a), the tax limitation in the Declaratory Judgment Act (28 U.S.C. 2201), the standing of plaintiffs, and the doctrine of sovereign immunity. (App. 31-33).

On cross-motions for summary judgment, the district court held that Revenue Ruling 69-545 violated the Internal Revenue Code. In reaching its decision the district court relied upon long-standing judicial and administrative authority and the legislative history which established that nonprofit hospitals must provide service to the indigent in order to retain their status as "charitable" institutions under the Code. (Pl. Pet. 46a, 48a-57a). In view of that holding, the court did not decide whether the peremptory issuance of the ruling also violated the APA (Pl. Pet. 57a). The district court also reaffirmed its position, rejecting the various jurisdictional barriers raised by defendants. (Pl. Pet. 37a-48a).

A divided panel in the court of appeals reversed the district court. While acknowledging that in the past

Congress, IRS, and the federal courts had conditioned a hospital's "charitable" status on the provision of free or below cost care to indigents, the court concluded that the determination of "charitable" status of hospitals need not always be so restricted (Pl. Pet. 23a-24a). Despite the total lack of any record that IRS considered the impact of the ruling upon poor people needing general hospital services, and a recognition by the court that IRS reached its conclusion (as set forth in the ruling) upon an analogy to trust law (Pl. Pet. 9a, n.3), the court concluded that Revenue Ruling 69-545 may be of greater benefit to the poor than the prior requirement (Pl. Pet. 27a). The court also held that the ruling was "interpretative", and therefore not subject to the rule-making requirements of section 553 of the APA. (Pl. Pet. 28a-29a). And based upon its own conjectures on the needs of the indigent, the court concluded that the ruling was not an "abuse of discretion" under Section 706(2)(A) of the APA. (Pl. Pet. 30a)

The dissenting judge stated that he would affirm the district court for the reasons stated in its opinion, and would also hold that the issuance of Revenue Ruling 69-545 worked a substantial change in the availability of hospital services to the poor without giving the poor or anyone else notice and an opportunity to comment upon it as required by section 553 of the APA. (Pl. Pet. 31a-32a). Over three dissents, review *en banc* was denied. (Pl. Pet. 1a-3a).

All three members of the court of appeals panel affirmed the judgment of the district court that it was not precluded from considering the case by virtue of the Anti-Injunction Act (26 U.S.C. § 7421a), the tax limitation clause in the Declaratory Judgment Act (28 U.S.C. § 2201), the standing of plaintiffs and the doctrine of sovereign immunity. (Pl. Pet. 12a-20a, 31a).

In their petition for certiorari plaintiffs raised the questions concerning the legality of Revenue Ruling 69-545 under sections 501(c)(3) and 170(a)-(c) of the Internal Revenue Code and sections 553 and 706(2)(A) of the Administrative Procedure Act. In their petition for certiorari defendants raised the questions concerning the jurisdiction of the district court under the anti-injunction provision of the Code (26 U.S.C. § 7421(a)), the tax limitation clause in the Declaratory Judgment Act (28 U.S.C. § 2201), and the doctrine of sovereign immunity.

SUMMARY OF ARGUMENT

I

Unlike religious and educational institutions, nonprofit hospitals have never been accorded separate status under sections 501(c)(3) and 170(c) of the Internal Revenue Code. They qualify for the tax benefits of these sections only if they can be characterized as "charitable."

For decades the IRS and the federal courts have ruled that nonprofit hospitals must provide free or below cost care to those unable to pay in order to maintain their "charitable" status. No other ruling is possible. A hospital which provides no free or below cost care is not lessening the burdens of government or otherwise providing a charitable service. It is essentially indistinguishable from the for-profit hospitals with which it is competing.

In 1969, nonprofit hospitals petitioned Congress for the same independent status under § 501(c)(3) accorded to religious and educational institutions. If the hospitals had been successful they would no longer be required to provide "charitable" service. But Congress confronted the issue squarely and squarely rejected the hospitals' petition.

Nevertheless that same year the IRS promulgated Revenue Ruling 69-545 which permits hospitals to retain their charitable status even if they afford no free care, provided they maintain an emergency room and accept public and private insurance payments. The ruling was promulgated without affording notice to and an opportunity to comment by interested persons, and nothing in the ruling indicates that the IRS considered the impact of the ruling on the health needs of poor people.

The IRS' justification for the new ruling was that it accorded with a changing view towards hospitals expressed in the law of charitable trusts. But in fact there has been no such change in the law of charitable trusts. Indeed, the very treatise sections cited by defendants are no different from what they were 30 years ago when the IRS and the courts rightly insisted that hospitals must provide free care in order to be charitable.

The court of appeals did not rely on the charitable trusts analogy but instead developed its own rationale for upholding Revenue Ruling 69-545. It thus violated one of the most basic tenets of administrative law—that a reviewing court cannot substitute its own policy justifications for the grounds relied upon by the administrative agency. Even more significantly, the court's justification for the new ruling was based on two unsupported and unsupportable premises.

First, the court suggested that the requirement that nonprofit hospitals serve those unable to pay was outdated because few people today are not covered by either public or private health insurance. But, as the Department of HEW has made clear, tens of millions of Americans are either completely without insurance coverage or have inadequate coverage.

Second, the court suggested that Revenue Ruling 69-545 might be more beneficial to the poor then the previous

requirement because it called for an open emergency room. But the court failed to address the question of where the poor are to obtain general non-emergency room hospital care. It did not face the fact that there are scores of middle-sized American communities where there is not a single public charity hospital to which the poor can turn for general hospital care, and that even where charity hospitals exist, they are often inadequate to care for all the poor.

The defendants and the court below simply ignored federal health policy. Unlike other industralized nations, the United States does not have universal health insurance. Instead, Congress has endorsed a mixed system which depends on the private sector to help provide health and hospital care to the poor. Within the last three years, for example, HEW has promulgated regulations redefining the statutory obligations of hospitals which have received Hill-Burton construction grants to serve those unable to pay. In December, 1974, Congress expressly reaffirmed these obligations. In short, Congressional policy in both the tax and health fields, judicial precedent, and the IRS' own prior rulings demonstrate that Revenue Ruling 69-545 does not comport with the Code. Defendants have no such power to amend the Code.

II

Apart from its substantive invalidity, Revenue Ruling 69-545 is procedurally invalid. The IRS promulgated it without the notice and comment period required by section 553(a) of the APA. The IRS also failed to consider the relevant health policy issues and thus abused its discretion under § 706(2)(A) of the APA.

Defendants claim that Revenue Ruling 69-545 is exempted from the requirements of section 553 as an interpretative ruling. But courts look behind the label used by agencies and require compliance with section

553 when the ruling has substantial impact on the regulated industry and the public, represents a substantial change in the law, and involves an area where the agency needs to educate itself. Revenue Ruling 69-545 affected millions of poor people and constituted a sharp break with the past. In addition, the IRS has no expertise and clearly requires education. In this regard, it is significant that HEW, which does have health expertise, complied with section 553 and even held a public hearing when it issued regulations on the obligations of Hill-Burton hospitals to provide free service to the poor.

The court below stated that Revenue Ruling 69-545 was interpretative because it was not legally binding on the courts. Yet the court went outside the record to postulate conceivable policy justifications for the ruling in the same way that a court would justify a statute challenged as irrational under the Constitution. It is difficult to see what greater binding effect the court could have given the ruling.

III

Defendants have unsuccessfully contended in the courts below that, despite the significant substantive and procedural issues raised by this case, plaintiffs have no recourse to judicial review. The defendants' position, more broadly, is that IRS tax rulings can only be challenged in court in a refund suit. This position means that IRS tax rulings which do not increase a taxpayer's burden are immune from judicial review no matter how blatantly illegal or unconstitutional they might be. The defendants' position flies in the face of the general principle that judicial review of administrative action is the rule and non-reviewability an exception which must be demonstrated by clear and convincing evidence of legislative intent. There is no such evidence here.

The Anti-Injunction Act, upon which defendants rely, bars suits for the purpose of restraining the assessment or collection of taxes. Its purpose is to prevent premature judicial interference with the collection of tax revenues. The instant case does not interfere with the collection of revenue in any way. If anything, the invalidation of the Revenue Ruling 69-545 would lead to an increase in Government revenues. The Declaratory Judgment Act bars suits "with respect to federal taxes." But legislative history and judicial precedent demonstrate that this tax suit exclusion was enacted solely to reinforce rather than expand the Anti-Injunction Act.

Defendants have also attempted to resurrect the widely criticized doctrine of sovereign immunity in this case. But this case falls within the traditional exception that sovereign immunity does not apply when an official has exceeded his statutory authority. In addition, this case was brought under the APA and, as several circuits have held, that Act constitutes a waiver of sovereign immunity.

Defendants below also contend that suits such as plaintiffs' would unduly burden the IRS and the courts. But the number of suits likely to be brought under the jurisdictional approach advanced by plaintiffs is infinitesimal compared to the massive number of refund and tax deficiency suits which the IRS and the courts now confront. Moreover, the substantive issues raised in the few non-taxpayer cases which may be brought are likely, as here, to be no different from the issues raised in refund and tax deficiency suits.

In short, defendants have not met the heavy burden they face when they argue against reviewability.

ARGUMENT

I. DEFENDANTS VIOLATED THE INTERNAL REVENUE CODE BY ELIMINATING THE OBLIGATIONS OF NONPROFIT HOSPITALS TO PROVIDE HOSPITAL CARE TO PERSONS UNABLE TO PAY AS A CONDITION FOR RETAINING "CHARITABLE" STATUS UNDER THE CODE.

A. The purpose for bestowing tax exempt and deduction benefits upon "charitable" hospitals requires that they provide service to persons unable to pay as a condition for their "charitable" status.

Unlike religious and educational institutions, nonprofit hospitals have never been accorded separate status under sections 501(c)(3) and 170(c) of the Internal Revenue Code. They qualify for the tax benefits of these sections only if they can be characterized as "charitable".[7]

The benefits accorded charitable organizations are substantial.[8] Charitable organizations are exempted from income taxes § 501(c)(3), and contributions to such organizations are deductible § 170(c). These tax benefits, which reduce the revenues of the United States, are conferred on the theory that the charitable organizations are performing functions which would otherwise need to be performed by government and are, therefore, lessening the burdens of government.[9]

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[7] The provisions originated in the first federal income tax statute in 1894. Section 32 of the Act of August 27, 1894, exempted from taxation,

> "Corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes, . . ."

The same exemptions with respect to corporation or associations organized for "religious, charitable, or educational purposes" was carried into the corporation excise tax law of 1909 (Act of Aug. 5, 1909, § 38, 36 Stat. 11) and the income tax law of 1913 (Tariff Act of Oct. 3, 1913, Ch. 16, § II(6)(a), 38 Stat. 114), which is the line progenitor of the present law. Congress has added other categories from time to time; "scientific" was added by the 1913 Act (ibid.), organizations devoted to the "prevention of cruelty to children or animals" by the 1918 Act (ibid.) (Rev. Act of Feb. 24, 1919, Ch. 18, 40 Stat. 1057, 1068), "literary" organizations by the 1921 Act (Rev. Act of Nov. 23, 1921, Ch. 136, 42 Stat. 227, 241), and organizations devoted to "public safety" with respect to 501(c)(3) status (but not 170 status) to the 1954 Act (Pub. L. 83-591, ch. 1, 68A Stat. 163). The origin of the deduction provisions appears in the 1918 Act (section 214(a)(11) Rev. Act of Nov. 23, 1921, *supra*).

[8] Without such qualification the income of nonprofit hospitals would be subject to taxation. In recent years the net income of nonprofit hospitals has considerably increased. According to reports issued by the U.S. Department of Health, Education and Welfare, based upon figures provided in the guide issues of the Journal of the American Hospital Association, nonprofit hospitals, collectively, had net income of $91,000,000 in 1961 and $457,000,000 in 1971.

See Social Security Bulletin, Vol. 36, No. 11, p. 5. U.S. Department of Health, Education and Welfare, November 1973.

Furthermore, donations of otherwise taxable income are considerable. For example, in fiscal year 1969, $2.3 billion in charitable contributions were made to hospitals, of which $1.5 billion was for construction or modernization of facilities (or 60 percent of the total $2.5 billion spent for construction that year). See Hearings on Medicare and Medicaid before the Subcomm. on Medicare-Medicaid of the Senate Comm. on Finance, 91st Cong. 2d Sess. 422 (1969).

[9] "The rationale for allowing the deduction of charitable contributions has historically been that by doing so, the government relieves itself of the burden of meeting public needs which in the absence of charitable activity would fall on the shoulders of the government." *McGlotten* v. *Connally*, 338 F.Supp. 448, 456 (D.D.C. 1972). This thesis has been set forth in a House Ways and Means Committee report which is often quoted:

> "The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare." H.R. Rep. No. 1860, 75th Cong., 3rd Sess. 19-20, 1938.

See also regulations defining charitable for tax exempt purposes. 26 CFR 1.501(c)-1(d)(2), *infra* pp. 3a.

It has been used by witnesses from the hospital industry in support of a continuation of the charitable deductions benefits for donors to hospitals. See testimony of representative of the Shriners Hospitals before the Ways and Means Committee:

Accordingly, nonprofit hospitals are charitable under the Code only if they lessen the burdens of government.[10] But, as many courts have concluded, hospitals which serve only those able to pay are not lessening the burdens of government; patients who can pay for health care will receive such care from the private sector.

Nonprofit hospitals which do not provide free care are no more charitable than the for-profit hospitals with which they compete.[11] Nonprofit status is not, of course, sufficient in itself to confer charitable status. There are 17 categories of nonprofit organizations under § 501(c)

"The moneys which pass to Shriners Hospitals and other public charities lessen the burden of Federal, State and local governments because of the free medical and health services we render to needy children." Committee on Ways and Means, 93rd Cong., 1st Sess., General Tax Reform, April 13, 1973, p. 6406.

See also the testimony of the President of the American Hospital Association at the same hearing, p. 6349 et seq., (See App. at 158).

[10] The Illinois Supreme Court denied tax-exempt status to an old people's home which reserved the right to discharge a resident who became sick, unmanageable, or depleted his assets, and then to cast him upon the State for care, saying,

> "The State would be bereft of any asset or estate from which it might seek reimbursement for its outlay after the person's demise. We can only infer that plaintiff's use of its property in this respect could tend to increase rather than lessen, the State's burden." *Methodist Old People's Home* v. *Korzen*, 39 Ill.2d 149, 155, 233 N.E.2d 537, 543 (1968).

In *Ruston Hospital* v. *Riser*, 191 So.2d 664 (La. 1966), the Louisiana court, noting that the institution did not admit charity patients and scheduled charges even for welfare patients, stated: "There is no basis for the contention that plaintiffs' operation in any way whatsoever served to relieve the State or its governmental subdivision of the burden of caring for the sick and indigent." See also *Presbyterian Homes* v. *Division of Tax Appeals*, 55 N.J. 275, 261 A.2d 143 (1970), and *Catholic Charities* v. *City of Pleasantville*, 109 N.J. Super. 475, 263 A.2d 803, 806 (1970). Federal cases are discussed at pp. 20-24, *infra*.

[11] In 1973 there were in the United States 3,320 nonprofit general and special hospitals, with 629,000 beds, and 757 for-profit general and special hospitals, with 63,000 beds. See American Hospital Association Guide to the Health Care Field, 1974, p. 19.

which are nontheless ineligible for the special benefits accorded to charitable organizations by § 170(c). To gain charitable status, the nonprofit hospital must do something more than merely not pay out profits to shareholders. Service to persons unable to pay is the *sine qua non* for charitable hospitals. Thus, the court below simply ignored the policy justification for according special tax benefits to donors of nonprofit hospitals when it held that defendants could relieve such hospitals of their duty to provide free or below cost care and still retain their charitable status under the Code.

The court also misread the relevant treasury regulation. It stated without analysis that the 1959 regulation (which did not follow a substantive change in the statute) broadened the concept of "charitable." (Pl. Pet. 21a). A review of that regulation indicates only that certain new types of organizations (such as civil rights groups) were now regarded as performing functions which lessen the burden of government. Nothing in the 1959 regulation suggests that organizations which systematically exclude those who cannot pay can be regarded as charitable.[12]

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[12] Nor was the court below correct in characterizing the final 1959 regulation as less restrictive than the initial 1956 proposal. (Pl. Pet. 21a). The 1956 proposal (21 Fed. Reg. 460, 464, January 21, 1956) provided:

> "Charitable organizations. Organizations formed and operated exclusively for charitable purposes include generally organizations for the relief of poverty, distress, or other conditions of similar public concern. The fact that a charitable organization established for the relief of indigent persons may receive voluntary contributions from persons intended to be relieved, or that a hospital may require payments for services from those able to pay, will not necessarily preclude exemption."

Although the term "distress" arguably may include health needs, its separate enumeration in this proposal was eliminated in the 1959 regulation, and it was linked by the conjunctive "and" to the "relief of the poor" concept. The term "other conditions of similar public concern" in the 1956 proposal is quite broad, but it was entirely

Not one of the purposes set forth in the definition of charitable in the 1959 regulation [13] describes organizations which charge all persons for service, except arguably education. However, education is specified as a *separate* exempt purpose in § 501(c)(3). Thus, educational institutions, unlike hospitals, do not have to afford "charitable" services.

General IRS policy, as expressed in other revenue rulings, confirms that "charitable" status requires donative or uncompensated undertakings. Just this past year IRS issued a comprehensive set of rulings defining when public interest law firms would be considered "charitable" for § 501(c)(3) and § 170 status. (See Revenue Rulings 75-74, 75-75, 75-76, and 75-77, March 10, 1975, Internal

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eliminated. The reference to hospitals charging persons able to pay in the 1956 proposal is a restatement of the case law which permitted charges to persons able to pay as long as persons unable to pay were served. (See *infra*, pp. 20-24).

[13] The treasury regulation which issued in 1959 (24 Fed. Reg. 5217, 5219, June 26, 1959), and is still in effect (26 CFR 1.501 (c)(3)-(1)(d)-(2)), defines the term "charitable" thus for Internal Revenue Code purposes:

> "The term 'charitable' is used in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of 'charity' as developed by judicial decisions. Such term includes: relief of the poor and distressed or of the underprivileged; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency. The fact that an organization which is organized and operated for the relief of indigent persons receives voluntary contributions from the persons intended to be relieved will not necessarily prevent such organizations from being exempt as an organization organized and operated for charitable purposes . . ."

Revenue Bulletin No. 1975-10). As stated in the lead ruling:

> "Charitability is also dependent upon the fact that the service provided by public interest law firms is distinguishable from that which is commercially available. *It is a general rule of charity law that the providing of an ordinary commercial service to the members of a community, even if done on a not-for-profit basis, is not regarded as charitable.*" (emphasis supplied) Rev. Rul. 75-74.

A public interest law firm that charges *any* of its clients would lose its charitable status (Rev. Rul. 75-75), and even those public interest law firms which limit fees to those awarded by a court or administrative agency may lose their charitable status if the cases they take have "the strong possibility of recovery of fees." (Rev. Rul. 75-76).

Similarly, IRS has ruled that a nonprofit organization formed to provide managerial and consulting services at cost to unrelated exempt organizations does not qualify for exemption as "charitable". The rationale for that ruling was stated thus:

> "Providing managerial and consulting services on a regular basis for a fee is trade or business ordinarily carried on for profit. The fact that the services in this case are provided at cost and solely for exempt organizations is not sufficient to characterize this activity as charitable within the meaning of section 501(c)(3) of the Code. *Furnishing the services at cost lacks the donative element necessary to establish this activity as charitable.*" (emphasis supplied). Rev. Rul. 72-369, Cum. Bull. 1972-2, p. 245-6.

In the housing market, IRS also has drawn a distinction between those nonprofit organizations which aid persons who cannot obtain conventional loans because of their poverty and/or which have programs designed to eliminate

prejudice, discrimination, and community deterioration, and those nonprofit organizations formed to provide moderate income families with housing at cost. The former are "charitable", but the latter are not, as the latter "program is not designed to provide relief to the poor or to carry out any other charitable purpose within the meaning of the regulations applicable to section 501(c)(3)." See Rev. Rul. 70-585, 1970-2 Cum. Bull. 115.

In the same way, a nonprofit hospital which charges all its patients at or above cost is competing with the commercial hospital market, lacks the donative element necessary to establish its activities as charitable, and is not designed to carry out any other charitable purpose within any of the classifications set forth in the treasury regulation and therefore cannot qualify for the benefits of § 501(c)(3) and § 170(c) status.

B. The well-established judicial interpretation of the application of "charitable" to hospitals under the Internal Revenue Code requires that such hospitals afford general hospital care to persons unable to pay.

The federal courts have long recognized that the charitable status of nonprofit hospitals under the Code depends upon the provision of free and below cost care to persons unable to pay. In fact, every federal tax court decision on the subject since 1942, and continuing to date, has so held.[14] *Commissioner* v. *Battle Creek Sanitarium*, 126 F.2d 405 (5th Cir., 1942); *Inter-City Hospital Association* v. *Squire*, 56 F.Supp. 472 (W.D. Wash. 1944); *Davis Hospital, Inc.*, 4 CCH Tax Ct. Mem. 312 (1945); *Goldsby King Memorial*, 3 CCH Tax Ct. Memo. 693 (1944); *Lorain Avenue Clinic*, 31 T.C. 141 (1958); *Robert Olney*, 17 CCH Tax Ct. Memo. 982 (1958); *Sonora Community Hospital*, 46 T.C. 519 (1966), aff'd per curiam, 397 F.2d 814 (9th Cir., 1968). See also, *Harding Hospital* v. *United States*, 358 F.Supp. 805 (S.D. Ohio, 1973), aff'd 505 F.2d 1068 (6th Cir., 1974). No federal case has ever held that a nonprofit hospital or health institution was charitable *per se*, or that exacting fees as a price of service in every case did not vitiate the claim of "charitable" purpose. Ibid. See also *Hassett* v. *Associated Hospital Service Corporation*, 125 F.2d 611, 614-5 (1st Cir. 1942).

[14] The issue does not appear to have been raised earlier in cases under the federal tax laws. But see state cases, discussed *infra*, pp. 29-30.

The basic test for defining a "charitable" hospital under the Code was stated by the Court of Appeals for the Fifth Circuit over thirty years ago:

> "It is also usual for hospitals and sanitariums to charge those able to pay for services rendered, in order to pay the expenses of the institution, *while not denying treatment to others unable to pay anything*. Such institutions are classed as charitable." *Commissioner* v. *Battle Creek Sanitarium*, 126 F.2d 405, 406 (5th Cir. 1942). (emphasis supplied).

Significantly, at that time IRS was taking a position 180 degrees from that expressed in Revenue Ruling 69-545, i.e. in 1942 IRS was stating that a hospital which charged *anyone* was not entitled to status as a charitable hospital. The Fifth Circuit rejected the contention because the hospital did not deny treatment to those persons unable to pay. The record demonstrated that a significantly large percentage of the patients received services, on both an inpatient and outpatient basis, free or below cost. Payment by persons able to pay permitted the hospital to provide charitable service to persons unable to pay.

For the next twenty-seven years the *Battle Creek* rule, permitting hospitals to charge persons able to pay *while not denying admission to others unable to pay*, remained

the basic rule for the courts and the Internal Revenue Service. In *Intercity Hospital Association* v. *Squire*, 56 F.Supp. 472, 474 (W.D. Wash., 1944) the IRS denied charitable tax status to the hospital, resting its conclusion upon the dual findings that, "in practically every case a charge is made for the services rendered" and "neither your articles of incorporation nor by-laws provide for the treatment of charitable patients, and it is apparent from the evidence presented that you have no purpose and made no pretense of bestowing charity." The court in that case rejected these findings of fact as unsubstantiated, and found rather that the evidence established

> "no questions whatever were asked [of the patients] and no statement required of financial standing nor ability to pay immediately or prospectively . . . [resulting in] . . . an amount ranging from six to eight percent of such gross income . . . [being] . . . donated to charity patients." (at 474).

The tax court issued similar opinions during the same period. Thus, in *Davis Hospital*, 4 CCH Tax Ct. Memo. 312 (1945) it deemphasized the stress which the Commissioner had placed upon the fact that the hospital charges those able to pay for the services rendered, stating

> "This is the usual practice of hospitals. *So long as admission and treatment are not denied to those unable to pay*, an institution is classed as charitable." (At 315).

See also, *Goldsby King Memorial*, 3 CCH Tax Ct. Memo. 693 (1944).

This was the state of the law when the IRS issued Revenue Ruling 56-185. That ruling was a "codification" of the *existing* legal requirements of the Code, as set forth in legal decisions, permitting nonprofit hospitals to charge those able to pay but requiring admission and

services to persons who could not pay. Specifically, the ruling required that a qualifying hospital

> "(m)ust be operated to the exent of its financial ability for those not able to pay for the services rendered and not exclusively for those who are able and expected to pay. *It is normal for hospitals to charge those able to pay for services rendered in order to meet the operating expenses of the institution, without denying medical care or treatment to others unable to pay.* The fact that its charity record is relatively low is not conclusive that a hospital is not operated for charitable purposes to the full extent of its financial ability. It may also set aside earnings which it uses for improvements and additions to hospital facilities. *It must not, however, refuse to accept patients in need of hospital care who cannot pay for such services.* Furthermore, if it operates with the expectation of full payment from all those who it renders services, it does not dispense charity merely because some of its patients fail to pay for the services rendered." Rev. Rul. 56-185, 1956-1, Cum. Bull. 202. (Emphasis supplied).

The same approach continued to be followed subsequent to the issuance of Revenue Ruling 56-185. In 1958 the Tax Court denied tax exempt status in *Lorain Avenue Clinic*, 31 T.C. 141 (1958), but granted it in *Robert C. Olney*, 17 CCH Tax Ct. Mem. 982 (1958). In *Olney* the two cases were compared, the court distinguishing *Lorain Avenue Clinic* in that

> "charitable services as were required . . . were occasional and of too minor volume to qualify petitioner for exemption [where] in the instant case . . . the hospital has numerous charity patients and was operated on a charitable basis to the extent of its financial ability" (at 993).

Again in *John J. Cranley, Jr.*, 20 CCH Tax Ct. Mem. 20 (1961), the Tax Court rejected a claim of charitable

exemption due to the absence of any evidence as to "how many patients, if any, paid reduced or nominal charges or no charge at all" during the five year period in question. In *Sonora Community Hospital*, 46 T.C. 519 (1966), aff'd *per curiam*, 397 F.2d 814 (9th Cir., 1968), the Tax Court continued to reiterate the same theme:

> "The amount of free care as rendered by petitioner was on a de minimum level, being less than 1 percent of paid care . . . a 'charitable' hospital may impose charges or fees for services rendered, and indeed, its charity record may be comparatively low . . . but a serious question is raised *where its charitable operation is virtually inconsequential.*" (At 526, emphasis supplied).

Most recently, in *Harding Hospital* v. *United States*, 505 F.2d 1068 (6th Cir., 1974), affirming 358 F.Supp. 805 (S.D. Ohio, 1973), the Sixth Circuit indicated that plans and policies for the admission of charity (i.e., nonpaying) patients continue to be a significant ingredient for the retention by a nonprofit hospital of its "charitable" status under the Code.

No federal case has ever held that a nonprofit hospital which limits general hospital care to persons able to pay is "charitable" within the meaning of the benefits provisions of the Code. Every federal tax case has considered service to the persons unable to pay as a *sine qua non* of "charitable" status for nonprofit hospitals.

C. Legislative history establishes that Congress rejected proposals to relieve "charitable" hospitals of the obligations under the Internal Revenue Code to provide hospital care to persons unable to pay.

The defendants are trying to amend the Code in disregard of the intention of Congress. On two occasions (in 1924 and in 1969) attempts were made to extend the benefits of the tax exempt and deduction provisions

to health instittuions apart from their charitable status, and on both occasions the attempts were rejected.

In 1924, the Senate rejected a proposal to broaden the term charitable by including social service and benevolent type activities including health. Senator Willis of Ohio, referring to a ruling of the IRS [15], proposed to add parenthetical language after "charitable" so as to include "preventive and constructive service for relief, rehabilitation, health, character building, and citizenship." (65 Cong. Rec. 8171 (1924)). The amendment was withdrawn after it became clear that the sentiment of the Senate, and the senators who would take the bill to conference, was against the broad sweep of the parenthetical language. (65 Cong. Rec. 8172-3).

The issue arose again in 1969, when Congress specifically addressed the question whether nonprofit hospitals should be added as a separate category under sections 501(c)(3) and 170(c). At hearings before the House Ways and Means Committee in February 1969, representatives of the American Hospital Association (AHA) testified that the mere provision of health care by nonprofit institutions is worthy of tax exempt and tax deduction status *per se*, and the requirement that such hospitals afford service to the indigent was archiac. (Hearings on the Tax Reform Act of 1969, H.R. 13270, Before the House Committee on Ways and Means, 91st Cong., 1st Sess. 1425, 1428, 1433 (1969)). The House bill, as reported in August 1969, accepted the AHA

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[15] In the ruling to which Senator Willis referred, the Commissioner, after noting that "in dealing with charitable trusts or uses the courts have tended to give a very broad meaning to the term 'charitable' on the ground that it was expedient to uphold such trusts or uses," stated that charitable for internal revenue purposes was more restrictive, i.e., used "in its popular and ordinary sense [which] pertains to the relief of the poor." Int. Rev. Bull. II-1-2 (1923), Ruling II-2-1128 I.T. 1800, 152, 153. Although Senator Willis referred to an earlier, contrary position by the predecessor Commisisoner, we have been totally unable to find any such ruling.

proposal, and provided that "hospitals" be added to the list of organizations under 501(c)(3) and 170(c), thus freeing hospitals from the requirement of giving charitable service. (House Report No. 413, 91st Cong., 1st Sess. 43 (1969)).

In October, while the Senate Finance Committee was considering the legislation, IRS issued Revenue Ruling 69-545. Two weeks later the Senate Finance Committee considered the issue, and clearly rejected the change in the Code proposed by the House bill and represented by the ruling at issue in the instant case. (S. Rep. No. 91-552, U.S. Code and Cong. News, 91st Cong., 1st Sess. 2089-90, 1969). The Senate passed the bill without the change giving hospitals separate status apart from the charitable category, and the final Act, after conference committee consideration, followed the Senate version. (Conference Report 91-782, 91st Cong., 1st Sess. 289-90 (1969)).

The court below concluded that the 1969 legislative history cannot be interpreted as a congressional disapproval of Revenue Ruling 69-545. (See Pl. Pet. 26a). That is a misreading of legislative history. The Senate Finance Committee rejected the provision and the House accepted the rejection of its previously passed amendment.

The Senate Report explains the deletion of the House amendment which added hospitals as a separate category under 170(c) and 501(c)(3):

> "The Internal Revenue Service has, . . . issued a ruling on October 8, 1969, indicating that hospitals, if they meet all the other requirements of section 501(c)(3), are exempt under that provision, whether or not they provide charitable services on a no-cost or low-cost basis."
>
> "Explanation of provisions—*The committee deleted from the bill those provisions which would have conformed the code to the result reached by the 1969 ruling.* The Committee decided to reexamine this matter in connection with pending legislation on Medicare and Medicaid." S. Rep. No. 91-552, U.S. Code Cong. & Admin. News, 91st Cong., 1st Sess. 2089-90, (1969) (emphasis supplied).

The Senate Finance Committee recognized that the 1969 ruling does *not* conform to the Code. Since defendants do not have any power to amend a congressional enactment, this statement in the Senate Report means that the ruling is *ultra vires*, as out of conformity with the Code. To the extent that there was any consideration by the Senate of this issue, it was with the representation as set forth in the committee report that the 1969 ruling did not conform to the Code, and that prior to any such change, the impact on the operation of the Medicaid and Medicare programs would have to be assessed.

The history in the House lends even less support to defendants. The House, which earlier had passed the amendment, and obviously assumed that it was *needed* in order to qualify hospitals for the tax benefits of these provisions without regard to service to the poor, accepted the deletion of the provisions. The Conference Report stated,

> "The House bill provides that hospitals, if they meet all other requirements of section 501(c)(3), are exempt under that provision, whether or not they provide charitable services on a no-cost or low-cost basis. The Senate Amendment strikes out these provisions."
> "The Conference substitute (sec. 101(j) of the substitute and sec. 501(c)(3) of the Code) follows the Senate Amendment." (Conference Report 91-782, U.S. Code Cong. & Admin. News, 91st Cong., 1st Sess. 2404 (1969)).

There is no mention of Revenue Ruling 69-545, let alone any suggestion that the House decided it did not need to

make the amendment because the defendants had issued Revenue Ruling 69-545. On the contrary the House, by agreeing to the deletion of the amendment, indicated that the earlier position was still the law of the land.

A subsequent Senate Finance Committee Staff report, issued two months after the final passage of the Tax Reform Act of 1969, explains why the ruling was rejected by the Senate Finance Committee. (See, *Medicare and Medicaid, Problems, Issues, and Alternatives*, Report of the Staff to the Committee on Finance, U.S. Senate, 91st Cong., 1st Sess. (Feb. 9, 1970), chap. 4). (App. 39-46). The Staff Report, after seriously criticizing the ruling,[16] refers to the opposition by the National Governors' Conference to the House Amendment. The Report then noted that recent transfers of indigent patients from the emergency rooms of nonprofit hospitals to D.C. General Hospital appeared to reenforce the anxiety expressed by the National Governors' Conference that the ruling and the House amendment would be detrimental to the operation of the Medicare and Medicaid programs and the availability of hospital services to the poor.

In sum, Congress rejected the AHA proposal that nonprofit hospitals enjoy § 170(c) and § 501(c)(3) tax benefits without providing charitable care. Defendants lack the power to amend the Code and confer benefits which Congress so specifically denied.

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[16] Referring to the representations of the American Hospital Association before the Committee on Ways and Means in October 1969, to the effect that nonprofit hospitals, unlike the rest of the private sector, extend their services to the entire community "regardless of the ability to pay," the Staff Report categorically states that a hospital (as described in the ruling) which excludes persons unable to pay from all but emergency room service is clearly not extending its service to the entire community. (App. 44-46).

D. The law of charitable trusts does not support the defendants.

In Revenue Ruling 69-545 defendants totally ignored the federal precedent discussed *supra*, pp. 20-24, and relied simply on general statements in treatises governing charitable trusts. (See *infra*, pp. 13a, 14a) But the defendants' interpretation of trust law is incorrect.

The trust law cases, including most of those cited in support of the statements in the treatises, do not hold that charitable hospitals may limit their services to persons able to pay, but stand for the same proposition as the federal tax cases, either that the rich *as well as* the poor may be treated at a "charitable" hospital, or that the hospital, home for the aged, or health facility must not exclude the indigent or its purpose is not "charitable." See, e.g. *Hart* v. *Taylor*, 301 Ill. 344, 133 N.E. 857, 858 (1922); *O'Brien* v. *Physicians' Hospital*, 96 Ohio St. 1, 116 N.E. 975, 977 (1917); *Cleveland Osteopathic Hospital* v. *Zangerle*, 153 Ohio 222, 223, 91 N.E. 261, 263 (1950); *Methodist Old People's Home* v. *Korzen*, 39 Ill. 2d 149, 233 N.E. 2d 537 (1968); *Ruston Hospital* v. *Riser*, 191 So. 2d 664 (La. 1966); *Presbyterian Homes* v. *Division of Tax Appeals*, 55 N.J. 275, 261 A.2d 143 (1970); *Catholic Charities* v. *City of Pleasantville*, 109 N.J. Super 475, 263 A.2d 803 (1970). And state cases continue in 1975 to hold that the poor may not be excluded from charitable hospitals. See, *Jackson County, Missouri* v. *State Tax Commission*, 521 SW2d 378 (Mo. 1975). Although some states have adopted the proposition that charitable hospitals need not serve the poor under the provisions of their local

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[17] That court reversed the administrative findings of fact that the three nonprofit hospitals did not serve the indigent, and, concluding that the evidence demonstrated that the hospitals were available to all, both rich *and poor*, found them qualified as charitable institutions. The court specifically rejected the notion that hospital care for the sick and infirm is a charitable purpose in and of itself. 521 SW2d at 383, 385.

laws (e.g., as cited by the court below, the State of Nebraska, in *Evangelical Lutheran Good Samaritan Society* v. *County of Gage*, 181 Neb. 831, 151 N.W. 2d 446, 449 (1967)), this is not the general rule for the law of trusts. (E.g., see above cited cases).

Further, there is nothing novel in the statements appearing in the cited treatises (3rd edition of Scott, 1967 and the 2nd edition of the Restatement on Trusts, 1959) (of which Scott was the principal reporter)), upon which defendants relied in Revenue Ruling 69-545. Earlier editions of Scott back to 1939 contain identical statements. Compare IV Scott on Trusts (3rd ed. 1967), sec. 368 and sec. 372.2 with IV Scott on Trusts (1st ed., 1939) and with IV Scott on Trusts (2nd ed., 1956). Obviously the statements were considered incorrect, irrelevant and/or not controlling for tax purposes during the development of federal tax precedent in the 1940s and 1950s.

E. The court before improperly relied on its own views of the health needs of the poor, and these views are, in any event, factually incorrect.

The court below justified the elimination of the free service requirement, not on the trust analogy used by defendants but upon the court's own conjectures as to the current needs of the poor for care by hospitals. Specifically, the court concluded that Revenue Ruling 69-545 reflected a "permissible" definition of charitable service upon two premises: (1) that the rationale for requiring hospitals to afford free and below cost services to persons unable to pay, i.e., the existence of a large number of poor persons without any public or private insurance coverage, has largely disappeared (Pl. Pet. 25a); and (2) Revenue Ruling 69-545, with its requirement of an open emergency room, may be of greater benefit to the poor than the requirements set forth in Revenue Ruling 56-185 (Pl. Pet. 27a).

These premises are vulnerable from two standpoints. First, Revenue Ruling 69-545 is entirely devoid of any reference to the needs of indigent persons for general hospital care and/or any evaluation of the beneficial value of an open emergency room compared to the availability of general hospital care.[18] This court has long held that an appellate court cannot substitute its own determination of policy, or the *post hoc* rationalization of appellate counsel,[19] for the grounds relied upon by the administrative agency. See, *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-9 (1962); *Bell* v. *United States*, 366 U.S. 410 (1961); see also, *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 419 (1971); *Camp* v. *Pitts*, 411 U.S. 138, (1974).

Secondly, the two premises are unsupportable. The first premise suggests that there are few if any poor people lacking means to pay for health care. That conclusion is without any basis in fact. Millions of poor people continue to be uncovered by any private or public health insurance program and are unable to pay for health and hospital care because of their own limited resources. Although the Medicaid program (42 U.S.C. 1396 *et seq.*) was theoretically designed to provide health coverage for the poor, it has been largely confined to the categorical public assistance recipients,[20] and, in ap-

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[18] Nor could defendants, tax experts, have determined these health system premises as a matter of agency expertise. Appellate counsel for defendants before the court of appeals acknowledged that "the experience [of the Commissioner of Internal Revenue] in the area of health care is severely limited." (Def. C.A. brief, p. 72).

[19] The premise that the emergency room service may be more valuable to the poor seems to come from appellate counsel's *post hoc* rationalization before the court of appeals. (Def. C.A. brief, p. 72).

[20] The categories are: the aged, the totally disabled, the blind, and children deprived of parental support by virtue of the death, disability, or absence of one parent. 42 U.S.C. 1396a(10)(A).

proximately half the states, to similar persons with incomes somewhat above the public assistance level.[21]

The levels of eligibility are abysmally low,[22] in most states far below the poverty guidelines which themselves are below subsistence.[23] In a state such as Louisiana, where Plaintiffs Cook, Hunter, and Lampton reside, eligibility for Medicaid depends upon eligibility for welfare, and the cut-off for welfare eligibility was an annual income for a family of four in excess of $1464 a year under the most recently available figures.[24] The family income for Plaintiff Hunter as of January 1973, ($196 per month for her and her five children), make her and her children (including two with acute sickle cell anemia) too "rich" for Medicaid. (App. 91).

Plaintiffs Henry and Carolyn Block reside in Arizona (App. 85-86), which is scheduled to institute a Medicaid program for the first time in October 1975. Even then, unless Arizona raises its welfare level substantially above the most recently published level ($2,208 for a family of four as of July 1974)[25], a large portion of the very poor who otherwise fit the public assistance categories will continue to be excluded. Plaintiffs Henry and Carolyn Block, and their three children, with an approximate $2,400 a year income (App. 85), will continue to be excluded, if not by their income, then because they are an "intact" family and do not fit into any of the public assistance categories.

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[21] See, Pl. Pet. 77a-79a for chart setting forth state-by-state levels for Medicaid eligibility.

[22] *Ibid.*

[23] The most recent figures set the poverty guidelines at $5050 for a family of four. 40 Fed. Reg. 14317-8 (1975).

[24] Pl. Pet. 77a-79a.

[25] Pl. Pet. 77a, n.3.

The U.S. Department of Health, Education and Welfare (hereinafter HEW), which is the designated federal agency expert in matters of determining health needs and health policy, has commented thus upon the inadequacies of the Medicaid program to cover all the poor:[26]

> ". . . Eligibility for Medicaid also poses financial barriers. Eligibility varies widely among the States, many of which exclude the working poor and adults in families headed by a male. Under these circumstances, half the families with incomes under $5000 a year and two-thirds of the families with incomes under $3000 have no insurance. Others excluded from protection are: children and mothers in low-income and middle-income families; the unemployed and their dependents; lower income self-employed people; employed people (mainly the working poor) whose employers offer no health plans; and migrant and seasonal workers."

HEW estimates that there are some 41 million Americans under the age of 65 who have no economic protection through private insurance against hospital costs,[27] only 17.4 million of whom are covered by Medicaid.[28] Most

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[26] Towards a Comprehensive Health Policy for the 1970's, A White Paper, May 1971, U.S. Department of Health, Education and Welfare, p. 16.

[27] See Mueller, Private Health Insurance in 1973: A Review of Coverage, Enrollment, and Financial Experience, Social Security Bulletin, U.S. Department of Health, Education and Welfare, February 1975, pp. 21-22. This estimate is, of course, prior to the recent upsurge of unemployment with its consequential losses of health insurance benefits by the recently unemployed.

[28] *Ibid.* Mueller indicates that 20.9 million persons had payments made on their behalf under Medicaid in fiscal year 1973, 16.8 percent of whom were over 65. We substracted persons over 65, as the basic figure (the 41 million) referred only to those under 65. (Persons over 65, whether poor or not, are, with some exceptions, covered by Medicare, the health insurance program for the aged, 42 U.S.C. 1395. Medicare however does not fully pay for health and hospital care for the aged, and some of the aged also would fall

of the 23.6 million without either private insurance or Medicaid coverage are clearly those too poor to pay for hospital care through their own resources.[29]

In addition to those poor who are not covered by any private or public health insurance program, an unknown number of low income people are covered by inadequate insurance which deprives them of admission to hospitals which require full payment. According to a comprehensive health insurance report by the staff of the House Ways and Means Committee, three-tenths of the expenditures for hospital care are not covered by insurance. (See, Basic Facts on the Health Industry, prepared for the use of the Committee on Ways and Means, 92nd Cong., 1st Sess., June 28, 1971, p. 104).

The second premise upon which the court justified its departure from precedent was the unsupported surmise that the provision of emergency room service to all may

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between the cracks, too rich for Medicaid but without any additional resources to pay for the health and hospital care not covered by Medicare).

[29] The poorer a person is, the less likely it is that he has health insurance.

In this regard, HEW provides the following information as to hospital insurance coverage of persons under 65 in 1968:

Family Income class (dollars)	Percentage of persons under 65 with hospital insurance	Percentage of persons under 17 with hospital insurance
Under 3,000	36.3	23.3
3,000-4,999	56.8	49.0
5,000-6,999	78.5	74.6
7,000-9,999	89.3	88.4
10,000 & over	92.3	91.8

Department of HEW, National Center for Health Statistics, Hospital and Surgical Insurance Coverage, United States—1968, Series 10, No. 66 (1972), pp. 18-19.

be more beneficial to the poor than a requirement of free and/or below cost general hospital care. This surmise was made by the court without any consideration of where the poor would receive general hospital services beyond the provision of emergency room care.[30]

Neither the defendants nor the court below considered whether alternative hospital care would be available for the indigent in communities which lack public charity hospitals. Many of the medium-sized communities of the United States are served by only nonprofit or for-profit hospitals—there are no public charity hospitals in such cities. Examples of such communities include: Topeka, Kansas; Peoria, Illinois; Springfield, Missouri; Charlotte, North Carolina; Spokane, Washington; Duluth, Minnesota; and the northern Virginia suburbs of Washington, D.C.[31] The same is true in rural communities, such as those in which the Kentucky plaintiffs reside.[32] Revenue

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[30] Most recently the Supreme Court rejected the distinction made between necessary-but-elective hospitalization and emergency hospitalization:

> "The State could not deny Evaro care just because, although gasping for breath, he was not in immediate danger of stopping breathing altogether. To allow a serious illness to go untreated until it requires emergency hospitalization is to subject the sufferer to the danger of a substantial and irrevocable deterioration in his health. Cancer, heart disease, or respiratory illness, if untreated for a year, may become all but irreversible paths to pain, disability and even loss of life. The denial of medical care is all the more cruel in this context, falling as it does on indigents who are often without the means to obtain alternative treatment."
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> *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 260-1 (1974).

[31] See chart, *infra*, pp. 17a-18a.

[32] Prestonburg General (d/b/a Highland Regional Medical Center) and Pikesville Methodist are the only hospitals in their respective communities. American Hospital Association Guide to the Health Care Field, 1974 Edition, p. 10. During its fiscal year 1971-2 Pikesville Methodist treated some 8,110 patients on a regular admission basis, only 24 of whom were treated free (App. 165-6). The administrator of that hospital admitted in a meeting with

Ruling 69-545 means that the only available hospitals in these and other similar communities have no legal obligation to provide persons unable to pay with general hospital care.

But the lack of alternative hospital facilities is not limited to communities without any public charity hospitals. Even in communities with publicly-owned charity hospitals there are an inadequate number of beds to serve the indigent.[33] For example, New Orleans, where plaintiffs Hunter, Cook, and Lampton reside, has a large charity hospital, but it serves the indigent of the entire state of Louisiana, and cannot accommodate all indigent persons needing hospitalization. The record in this case includes the affidavits of physicians who have continually been forced to turn away from that charity hospital 35 to 50 persons a day (App. 126) who, in their judgment as physicians, should be hospitalized. (App. 125-144, 116).[34] Plaintiffs Hunter, Cook and Lampton have attempted to be admitted for hospital care at various nonprofit hospitals in New Orleans, but have been turned away because they lacked the means to pay. (App. 98-9, 103-5, 112-3).

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members of the health committee of Plaintiff EKWRO that the admission practice is, "if they don't have the money, they don't get in." (App. 79-80). Persons unable to pay have been turned away from admission into Pikesville Methodist for necessary surgery (App. 84).

[33] The inadequacies of the understaffed, under-equipped, and underfinanced public hospitals have been extensively domunented. See, July 1970 Issue of Hospitals (the official publication of the American Hospital Association) devoted entirely to "The Plight of the Public Hospital." See also, Rose, *The Internal Revenue Service's "Contribution" to the Health Problems of the Poor*, 21 The Catholic Un. Law Rev. 35, 36, fn. 3.

[34] As the record in this case demonstrates, and the opinion of this Court in *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 260-1 (1974) recognized, the unavailability of inpatient hospital care may make inevitable the road to death. (See, App. 116-121, 96, 122-124 documenting the rejection of admission for inpatient care by nonprofit hospitals because of lack of ability to pay of two persons who soon thereafter died.)

Even the requirement that a hospital provide an open emergency room is illusory. Those hospitals not located within poverty areas would rarely, if ever, be called upon to provide emergency treatment for the poor. Obviously, the pressing need for emergency care does not allow the poor the time nor the means to travel to outlying hospitals. However, the poor would utilize these hospitals for necessary "elective" care such as obstetrics and general surgey, particularly if the nearby charity hospitals were over-crowded and understaffed.

Further, under the ruling, hospitals are free to patch up patients in the emergency room and then transfer them to charity hospitals rather than admit them. (See *infra*, pp. 11a-12a). Such transfers to public charity hospitals may be medically detrimental, as recognized by physicians (App. 131-2) but not by defendants and the court of appeals. This transfer arrangement, which has been given the less delicate name of "dumping",[35] was one of the concerns of the Senate Finance Committee at the time that Committee rejected the House amendment. (See App. 43).

The speculations of the court as to the needs of indigent persons without means to pay for hospital care and the beneficial value of emergency room service compared to the availability of general, across-the-board hospital care are unsupported by the record and have little relationship to the health needs of the poor.

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[35] In this regard in the July 1970 issue of HOSPITALS, its feature editor states:

> "Whereas the 'mainstream' of health care during the 1950s and early 1960s was progressive and represented by research-oriented medical centers, public hospitals became the 'dumping grounds' for the medically indigent and had come to be identified with a dual standard of health care delivery. The passage of Medicare and Medicaid legislation in the mid-1960s was expected to unify the dual system. Unfortunately, the private sector has not absorbed its proportionate share of the sick poor" HOSPITALS (AHA), July 1, 1970, at 54.

F. Neither defendants nor the court below considered the health policy of the United States as expressed by congress and the health agency of the United States.

As recognized by the court in *Green* v. *Connally*, 330 F.Supp. 1150 (D.D.C., 1970), aff'd *per curiam sub nom. Coit* v. *Green*, 404 U.S. 997 (1971),

> ". . . the ultimate criterion for determination . . . [of] eligibil[ity] . . . under the 'charitable' organization provisions of the Code rests not on a common law referrant but on . . . Federal policy." (At 1161).

Federal health policy presupposes and requires that non-profit hospitals provide free care to the indigent.

The United States is the only industralized country in the world without a publicly-financed universal health insurance system. Rather than providing publicly-financed national health insurance, Congress has endorsed a mixed system. The federal government provides incentives to the private sector—direct subsidies (such as Hill-Burton grants)[36] and indirect tax subsidies—and the private sector provides health and hospital care to the poor.

While defendants and the court below were defending the abandonment by IRS of the charitable obligation of non-profit hospitals to the millions of uninsured indigent persons, HEW was reaffirming the charitable obligations of those hospitals which had received Hill-Burton construction monies.[37] In July 1972 and June

[36] 42 U.S.C. 291 *et seq.*, Title VI of the Public Health Service.

[37] Nonprofit hospitals are eligible for Hill-Burton grants. However, a significant percentage of nonprofit hospitals have not received any Hill-Burton monies (about 40%) and are therefore not subject to the "free service" requirements of that program. Other nonprofit hospitals received Hill-Burton monies over 20 years ago, and the obilgation no longer applies. 42 CFR 53.111(a). Other nonprofit hospitals received very small grants, and accordingly have very small Hill-Burton obligations (42 CFR 53.111(d)) which have no relationship to the size of charitable contributions received.

1973, HEW promulgated regulations setting forth more specific guidelines defining the obligations of Hill-Burton hospitals to serve persons unable to pay.[38] And Congress in December 1974 reaffirmed the obligations of such hospitals by including in the new Title XVI of the Public Health Service Act provisions which continue HEW's duty to enforce the Hill-Burton obligations and require new obligations for all future grantees.[39]

Thus, Revenue Ruling 69-545 was issued without any consideration of the health policies as expressed generally by Congress and HEW.

G. The power of defendants to administer the Internal Revenue Code does not include the power to amend the Code.

This Court has held on inumerable occasions that the power of the Commissioner of Internal Revenue

[38] 42 CFR 53.111, 37 Fed. Reg. 14719 (1972); 38 Fed. Reg. 16353 (1973). The Hill-Burton standards are set forth in the alternative, one measure of which is the size of the grant. 42 CFR 53.111 (d). Similarly, the obligation of a nonprofit hospital during any given year might be measured by the size of charitable donations to it, and a proportion of its otherwise taxable income.

[39] National Health Planning and Resources Development Act of 1974, P. Law 93-641, sections 1602(5) and (6), 1604(b)(1)(J), and 1612(c). (Title XVI of the Public Health Service Act (January 4, 1975)). In June 1974, the chairman of the Health Subcommittee of the Senate, in introducing that Subcommittee's health facilities bill (which ultimately became part of Public Law 93-641), stated with regard to the free service obligations of Hill-Burton hospitals (and referring to the district court decision in the instant case which declared Revenue Ruling 69-545 void):

> "Until the ability to pay is totally eliminated as a criterion of access in our society, the 'free service' assurance will have to be enforced. A similar requirement regarding the provision of services to those unable to pay for such services for hospitals which seek the benefits of 'charitable' status under the Internal Revenue Code has also recently been recognized by a Federal court here in the District of Columbia." 121 Cong. Rec. S.9538 (June 4, 1975).

> "is not the power to make law . . . but to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *Manhatten General Equipment Co.* v. *Commissioner*, 297 U.S. 129, 134 (1936); *Dixon* v. *United States*, 381 U.S. 68, 74-75 (1965).

See also, *United States* v. *Cartwright*, 411 U.S. 546, 550 (1973); *Fribourg Navigation Co.* v. *Commissioner*, 383 U.S. 272 (1966); *Corn Products Refining Co.* v. *Commissioner*, 350 U.S. 46, 52-3 (1955), motion for rehearing denied, 350 U.S. 943 (1956); *United States* v. *Leslie Salt*, 350 U.S. 383, 396-7 (1955).

But "make law" is precisely what the defendants have done in the instant case. The judicial, administrative, and legislative history of the application of "charitable" under sections 501(c)(3) and 170(c) to nonprofit hospitals requires such institutions to provide services to persons unable to pay.

In *Fribourg Navigation Co.* v. *Commissioner*, 383 U.S. 272 (1966) the Supreme Court admonished the Commissioner for a similar amendment to the Code and found that he had exceeded his statutory authority:

> "Over the same extended period of years during which the foregoing administrative and judicial precedent was accumulating, Congress repeatedly reenacted the . . . provision without significant change. Thus, beyond the generally understood scope of the . . . provision itself, the Commissioner's long standing and consistent administrative practice must be deemed to have received congressional approval." (At 283).

See also, *United States* v. *Leslie Salt*, 350 U.S. 383, 396-7 (1956); *Corn Products Refining Co.* v. *Commissioner*,

350 U.S. 46, 52-3 (1955) motion for rehearing denied, 350 U.S. 943 (1956). The same admonishment is applicable in the instant case.

Neither a proper reading of the trust law analogy, the realities of the health needs of the poor, or the health policies of Congress and HEW, renders reasonable defendants' departure from precedent. Defendants have simply usurped congressional power and rewritten the law.

II. THE DEFENDANTS VIOLATED THE RULE-MAKING REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT.

Even if defendants did not violate the "charitable" provisions of the Internal Revenue Code, they did violate the APA by the promulgation of a major policy revision eliminating the long-standing obligation of charitable hospitals to the poor [40] without following the rule-making requirements of section 553 (5 U.S.C. 553). In addition, Revenue Ruling 69-545 was promulgated without consideration of the relevant factors necessary for informed agency action, and therefore constitutes arbitrary and capricious action or an abuse of discretion within the meaning of section 706(2)(A) of the APA. (5 U.S.C. 706(2)(A)).

Defendants contended below that Revenue Ruling 69-545 was an "interpretative" ruling, not subject to the rule-making requirements of section 553. The panel majority accepted this characterization, and also concluded that the ruling was not an abuse of discretion, again by inserting its own unsupported conjectures as to the needs of the poor and the comparative benefits of the new

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[40] One of the leading proponents of Revenue Ruling 69-545 is counsel for the American Hospital Association in this case. While an employee of the Internal Revenue Service he admitted that Revenue Ruling 69-545 was "a major revision". See, Bromberg, *The Charitable Hospital*, 20 The Cath. U. L. Rev. 237 (1970).

ruling and the prior requirement of general free service. (See Pl. Pt. 30a).

In both respects, the court erred.

A. The defendants were required to afford notice in the Federal Register and opportunity for public comment under section 553 of the APA.

Section 553 of the APA requires that an agency which engages in rule-making must do so by a general notice in the Federal Register which includes the terms or substance of the proposed rule or a description of the subjects and issues involved, and must give interested persons an opportunity to participate in the rule-making process (5 U.S.C. 553).

Defendants do not claim that the Department of the Treasury or the Internal Revenue Service are not "agencies" within the meaning of the APA, or that they are not subject to the rule-making requirements of section 553. Defendants claim, however, that their major policy revision could be promulgated without notice and comment period because it was an interpretative rule and therefore excepted from the requirements of section 553.

But whether a particular rule is governed by the requirements of section 553, or comes within one of its exceptions, is not determined by the label which the agency places upon the rule. See, e.g., *Lewis-Mota* v. *Secretary of Labor*, 469 F.2d 478, 481-2 (2nd Cir. 1972); *Texaco, Inc.* v. *Federal Power Commission*, 412 F.2d 740, 744 (3rd Cir. 1969); *Hou Ching Chow* v. *Attorney General*, 362 F.Supp. 1288, 1292 (D.D.C. 1973). Case law makes clear that Revenue Ruling 69-545 is not an interpretative rule.

Several federal courts have addressed in recent years the subject of which rules of an agency are governed by the requirements of section 553, and

which are excluded by reason of one of the exceptions. Out of these cases have emerged criteria applicable to all the exceptions. These criteria are: (1) does the rule have a substantial impact upon the regulated industry; (2) does the rule have a substantial impact upon the public (or segment of the public); (3) is there a drastic change in the law as it existed before the rule was issued; (4) is there a need for the agency to educate itself. See, *Texaco, Inc.* v. *Federal Power Commission, supra; Lewis-Mota* v. *Secretary of Labor, supra; National Motor Freight Traffic Ass'n* v. *United States*, 268 F.Supp. 90 (D.D.C. 1967); *Pharmaceutical Manufacturers Ass'n* v. *Finch*, 307 F.Supp. 858 (D.Del. 1970); *Seaboard World Airlines* v. *Gronouski*, 230 F.Supp. 44 (D.D.C. 1964); *Kelly* v. *U.S. Dept. of Interior*, 339 F. Supp. 1095 (E.D. Cal. 1972); *Hou Ching Chow* v. *Attorney General, supra.* See also, *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969).

In two 1970 cases the U.S. District Court in Delaware applied these criteria to determine whether a rule was legislative, and thus subject to 553 requirements, or interpretative, and thus exempted. In *Pharmaceutical Manufacturers, supra*, the underlying issue involved the tests which would be required to evaluate the effectiveness of all drugs currently on the market. The record demonstrated that the regulations in effect from 1938 through 1962 required different tests from those required by the challenged rule. After describing the substantial impact of the challenged rule on both the regulated industry and the public, and noting that the notice and comment requirements enabled the agency promulgating the rule to educate itself, the court found that notice and opportunity for public comment were required.

Conversely, in *Continental Oil Company* v. *Burns*, 317 F.Supp. 194 (D.Del., 1970), the same court found that the challenged rule was limited to an interpretation of a regulation which had not yet become effective. Since

the law (the Truth in Lending Act) and the regulation were new, and the rule did not cause any drastic change in the law, the rule was held to be interpretative.

In the instant case the ruling constituted a reversal of a long-contrary and judically-accepted policy. (See *supra*, pp. 20-24). The ruling clearly has a substantial impact upon the way hospitals are permitted to provide service to the poor, and upon the ability of persons unable to pay to obtain hospital care.

Moreover, defendants are not experts in health care delivery problems; they certainly needed to educate themselves before they could even consider such a significant action in this field. In this regard, it should be noted that HEW, the health agency, in promulgating standards and procedures for the free care requirements under the Hill-Burton Act, not only has given section 553 notice and opportunity for comment[41] but also held a public hearing.[42] No less should be required of an agency which ventured into the health care field without any expertise.

Case law with respect to the other exceptions from the application of the notice and comment requirements also demonstrates that the APA was violated in this case.

In *Lewis-Mota* v. *Secretary of Labor*, 469 F.2d 478 (2nd Cir. 1972) the agency argued that a directive which

[41] 37 Fed. Reg. 7632 (1972); 37 Fed. Reg. 14719 (1972). HEW has continued to follow section 553 requirements for further aspects of the "free service" (40 Fed. Reg. 10686 (1975)) and companion "community service" requirements (39 Fed. Reg. 1446 (1974)).

[42] 37 Fed. Reg. 20878 (1972). Representatives of the hospital industry, representatives of poor people such as the National Welfare Rights Organization (the parent organization of plaintiffs EKWRO and CWRO), and organizations such as the American Public Health Association, the American Federation of State, County and Municipal Employees, and the National Urban League made statements at the hearing. (Transcript of hearing "In the Matter of: Federal Hospital Council," DHEW, Oct. 20, 1972). Similar comments filed with IRS would have "educated" IRS and given that agency the opportunity to assess the impact of the ruling and its wisdom before becoming committed to it.

suspended precertification lists for aliens granted the right to work in the United States was merely "a general statement of agency policy or procedure." The Second Circuit, rejecting the label which the agency put upon its exercise of administrative power, stated that the real test was what the action in fact accomplished:

> "We find that it changed existing rights and obligations . . . By virtue of this substantial impact both upon the aliens and employers, notice and opportunity for comment by the public should first be provided." (At 482).

That court (at 482) also noted that the publication requirement of section 553 "enables the Agency promulgating the rule to educate itself," (quoting *Texaco, Inc.* v. *Federal Power Commission*, 412 F.2d 740 at 744 (3rd Cir. 1969)).

In *National Motor Freight Traffic Association* v. *United States*, 268 F.Supp. 90 (D.D.C., 1967), the court rejected a claim that the establishment of an informal procedure to settle reparation claims was not subject to the rule-making requirements. The court found that the procedures, which had been voluntarily established by the agency, were not routine. Noting the importance which the agency itself attached to the procedures, the court stated:

> "That very quality of importance—to the industry and to the public—is what lies at the base of Section 4 of the APA and which informs [sic] the Congressional purpose in that law to expose proposed agency action by general rule to the test of prior examination and comment by the affected parties." (At 96).

In *Texaco, Inc.* v. *Federal Power Commission*, 412 F.2d 740 (3rd Cir. 1969) the petitioner sought review of a regulation requiring it to pay interest compounded monthly on refunds ordered by the Federal Power Commission. The Commission contended that it did not have to provide for notice and hearing because it was "un-

necessary" as that word is used in section 553(b). The court disagreed, finding that the rule could not be classified as "either minor or emergency in character." It then stated the policy of the rule-making requirements:

> "Section 553 was enacted to give the public an opportunity to participate in the rule-making process. It also enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated. . . . These procedures must be followed when an agency is exercising its legislative function." (At 744).

In *Seaboard World Airlines, Inc.* v. *Gronouski*, 230 F.Supp. 44 (D.D.C. 1964), the government also claimed that its new policy came within an exception to the notice and comment requirements of section 553. The court rejected the claim, again noting that the policy "substantially affects outside parties, and is therefore NOT subject to the exception." (At 46). (emphasis in original).

The theme of all these cases was accepted by this Court in *N.L.R.B.* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969). The plurality opinion states:

> "The rule-making provisions . . . were designed to assure *fairness* and *mature consideration* of rules of general application." (At 764) (emphasis supplied).

See also opinion of Justice Douglas, at pp. 777-778.

The court below accepted defendants' contention that the ruling was within the interpretative exception, because it was not "legally binding." In support it cited *American President Lines* v. *Federal Maritime Commissioner*, 316 F.2d 419, 421-2 (D.C.Cir. 1963), which characterized an interpretative ruling as essentially an opinion of the legal staff of an agency which the parties and the courts are free to ignore.

The court below misapplied *American President Lines*. The plaintiff in that case could ignore the ruling of the defendant federal officials. When the defendant sought to enforce the rule, the plaintiff could challenge the rule in court. As stated in *American President Lines*, at 422,

> "Neither the *affected parties* nor the courts are bound by it unless they elect to adopt it as a correct interpretation of the statute." (emphasis supplied).

Here, by contrast, affected parties, people unable to pay for hospital care, are effectively bound by Revenue Ruling 69-545. They can not act in disregard of the rule, which has its own operating force against them. As stated by the Second Circuit in *Lewis-Mota* v. *Secretary of Labor*, 469 F.2d at 482, the rule "changed existing rights and obligations."

Further, the court below said Revenue Ruling 69-545 is not legally binding upon courts. Yet it went outside the record to postulate conceivable policy justifications for the ruling in the same way that a court would justify a statute challenged as irrational under the Constitution. See, e.g., *Kotch* v. *Board of River Boat Pilot Com'rs*, 330 U.S. 552 at 563 (1947) *Morey* v. *Doud*, 354 U.S. 457 at 464 (1957)). It is difficult to see what greater binding effect the court could have given Revenue Ruling 69-545. As stated by Chief Judge Bazelon in his dissent from the denial of plaintiffs' suggestion for *en banc* consideration,

> . . . the majority tells the plaintiffs that it will not be bound by the Internal Revenue Service interpretation of the term 'charitable' and then turns right around and upholds the Service interpretation as a permissible exercise of discretion on the basis of factual assumptions which are not supported by a record and which plaintiffs have not had an opportunity to rebut. (Pl. Pet. 3a).

B. The defendants had the legal obligation to consider all relevant factors in reaching their determination of "charitable" requirements for nonprofit hospitals.

Section 706(2)(A) of the APA (5 U.S.C. 706(2)(A)) provides that a court may set aside agency action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Even if this Court concludes that the defendants' action was not subject to the rule-making requirements of section 553, it must still find that the agency action was accomplished without consideration of the relevant factors necessary for the decision.

In *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971) this Court held that governmental officials must utilize some institutional method in exercising their duties to assure that all the relevant factual information is before them. See also, *Shannon* v. *H.U.D.*, 436 F.2d 809, 819-20 (3rd Cir. 1970).

In the instant case the defendants put on blinders, and totally excluded all reference to the continued needs of poor people for access to nonprofit hospitals for general care.[43] The sole basis upon which the defendants issued Revenue Ruling 69-545 was an analogy to the law of charitable trusts as reported by treatise writers on the subject. (See, *infra*, pp. 13a, 14a).

The court below concluded that defendants did consider the needs of the poor. However the court referred only to its *own* conjectures as to the beneficial value of an emergency room and the "changed health care situation in the country." (Pl. Pet. 30a; see discussion *supra*, pp.

[43] The continued needs of poor people for access to nonprofit hospitals is surely a relevant factor. See, e.g., the action by the Senate Finance Committee which refused to make the change in the law and referred it to future consideration in context of Medicare and Medicaid, health legislation. (*Supra*, pp. 27, 28).

30-31). As discussed above (p. 30), the speculations of a court cannot substitute for the lack of consideration of relevant factors by an administrative agency.

III. THE COURTS BELOW WERE CORRECT IN HOLDING THAT THERE WERE NO JURISDICTIONAL BARRIERS TO A CONSIDERATION OF THIS CASE.

The defendants have unsuccessfully contended in the courts below that plaintiffs have no recourse to judicial review. In their petition for certiorari, defendants raise three barriers to review in this case: the Anti-Injunction provision of 26 U.S.C. § 7421(a); the exclusion of suits "with respect to Federal taxes" in the Declaratory Judgment Act (28 U.S.C. § 2201); and the doctrine of sovereign immunity. The defendants' position, more broadly, is that IRS tax rulings can only be challenged in court in a refund suit. This position means that IRS tax rulings which do not increase a taxpayer's burden are immune from judicial review, no matter how blatantly illegal or unconstitutional they might be.

The defendants' position flies in the face of the general principle that judicial review of administrative action is the rule and non-reviewability an exception which must be demonstrated by "clear and convincing evidence" of legislative intent.[44] The defendants' position is without statutory support. It is, finally, nothing more than an unwarranted assertion of the power to act without regard to the rule of law.

A. The Anti-Injunction and Declaratory Judgment Acts do not bar the present action.

The anti-injunction provision of the Internal Revenue Code, 26 U.S.C. § 7421(a), bars any "suit for the pur-

[44] See *Barlow* v. *Collins*, 397 U.S. 159, 166-167 (1970). See also *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967); *Rusk* v. *Cort*, 369 U.S. 367, 379-80 (1962).

pose of restraining the assessment or collection of any tax. . ." The purpose of the provision is clear from its language: to prevent judicial interference with the collection of tax revenues, interference which could grind the entire government to a halt. As the Supreme Court stated in *Enochs* v. *Williams Packing and Navigation Co.*, 370 U.S. 1, 7 (1962)

> "The manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention and to require that the legal right to disputed sums be determined in a suit for a refund. In this manner, the United States is assured of prompt collection of its lawful revenue."

The narrow scope of § 7421(a) is made clear by the Court's holding in *Williams Packing*. The Court held that, despite the express language of § 7421(a), a court could grant an injunction if it was certain that under no circumstance could the Government ultimately prevail on the merits. If the Government could not ultimately prevail, the Court reasoned, the collection of lawful revenues was not jeopardized and "the central purpose of the Act is inapplicable." 370 U.S. at 7. The fact that such an injunction suit would have collateral adverse impacts on the IRS—by forcing it to defend a lawsuit—was not deemed controlling by the Court.[45]

In its two most recent interpretations of the Anti-Injunction Act, *Bob Jones University* v. *Simon*, 416 U.S. 725 (1975) and *Alexander* v. *"Americans United", Inc.*, 416 U.S. 752 (1975), this Court implicitly reaffirmed that narrow scope of § 7421(a). The Court's opinions strongly indicate that the term "assessment and collection of

[45] The Court did state that a collateral purpose of the Act was the "protection of the collector from litigation pending a suit for a refund." 370 U.S. at 7-8. In this case, of course, no suit for a refund is possible. See discussion, *infra*, pp. 51-52.

taxes" is not an ever-expanding catchall, but means precisely what it says. In *Bob Jones University*, the Court spent some three pages to demonstrate that there is "little doubt that a primary purpose of this lawsuit is to prevent the Service from assessing and collecting income taxes from petitioner." 416 U.S. at 738. In *"Americans United"* the Court stressed that "under any reasonable construction of the statutory term 'purpose' the objective of this suit was to restrain the assessment and collection of taxes from respondent's contributors." 416 U.S. at 762.

Moreover, the Court explicitly left open the possibility that there are injunctive suits against the IRS which do not involve the assessment and collection of taxes and thus are not barred by § 7421. In *Bob Jones University*, while discussing whether an injunction could issue in a refund suit, the Court stated:

> For example, it may be possible to conclude that a suit for a refund is not "for the purpose of restraining the assessment or collection of any tax . . ." and thus that neither the literal terms nor the principle purpose of § 7421 are applicable." 416 U.S. at 748 n. 22.

Obviously, plaintiffs' challenge to Revenue Ruling 69-545 does not restrain the assessment or collection of any tax. It does not interfere with the collection of revenues in any way. If anything, the invalidation of the ruling would lead to an increase in government revenues; most likely it would have no impact at all.[46]

[46] Plaintiffs seek to compel the IRS to withdraw Revenue Ruling 69-545, which would reinstate the previous ruling requiring tax-exempt hospitals to provide some free care. Their expectation is that hospitals would adhere to the previous ruling rather than face loss of exemption. Under these circumstances, the tax exempt status of the hospitals would remain the same and there would be no change in the revenues collected by the Treasury. If, on the other hand, certain hospitals lost their exemption, the Treasury would collect additional revenues from the hospitals and perhaps from their contributors as well.

Plaintiffs' Administrative Procedure Act claims are even further removed from a restraint on the assessment and collection of taxes. A court could, for example, order the IRS to permit a thirty day comment period on a proposed regulation embodying the substance of Revenue Ruling 69-545 without requiring the IRS to alter the status of any hospital or contribution. Interested and affected persons would thus be given the opportunity to educate the IRS, as required by 5 U.S.C. § 553,[47] and the IRS would then be free to promulgate its position in proper regulation form.

In short, neither plaintiffs' substantive nor procedural claims involve a restraint on the assessment and collection of taxes. Plaintiffs' suit is simply outside the ambit of the Anti-Injunction Act.[48]

It should also be noted that the Court stated again and again in *Bob Jones* and *"Americans United"* that § 7421 bars *pre-enforcement* injunctions against the assessment and collection of taxes. See e.g. 416 U.S. at 736, 742, 743, 748 n.22. In the instant case, plaintiffs are not seeking a pre-enforcement injunction, since no enforcement—i.e., the assessment and collection of taxes —is about to occur. This in turn means that plaintiffs do not have access to a refund suit or any other means of obtaining judicial review of the legality of IRS action.

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[47] See discussion *supra*, pp. 42-47.

[48] See *McGlotten* v. *Conally*, 338 F. Supp. 448, 453-54 (D.D.C. 1972) where the court held that a challenge by a black American to the granting of tax benefits to a segregated fraternal organization had

> "nothing to do with the assessment or collection of taxes. [Plaintiff] does not contest the amount of his own tax, nor does he seek to limit the amount of tax revenue collectible by the United States. The preferred course of raising his objections in a suit for a refund is not available. In this situation we cannot read the statute to bar the present suit."

The Court expressly pointed out in *Bob Jones University* that "this is not a case in which an aggrieved party has no access at all to judicial review. Were that true our conclusion might well be different." 416 U.S. at 746. Section 7421(a) provides no support, let alone clear and convincing evidence, for the proposition that Congress wished to foreclose all judicial review in cases which do not interrupt the assessment and collection of taxes in any way.

The defendants, perhaps recognizing the weakness of their § 7421 argument, also relied below on the Declaratory Judgment Act, 28 USC § 2201, which excludes suits "with respect to federal taxes." The defendants contended below that the prohibition contained in the Declaratory Judgment Act applies to injunctive relief as well, since a declaration of rights is implicit in an injunction.

Plaintiffs agree that the prohibitions contained in the two Acts are coterminous. It would be incongruous indeed if a court were barred from issuing a declaratory judgment but was free to order injunctive relief.[49] The question then becomes whether the more general language of the Declaratory Judgment Act expands the scope of the Anti-Injunction Act or whether, to the contrary, the language of the Anti-Injunction Act defines the scope of the Declaratory Judgment Act.[50] Legislative history, judicial decisions and common sense all indicate that the Declaratory Judgment Act is governed by the language of the Anti-Injunction Act.

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[49] See *Tomlinson* v. *Smith*, 128 F.2d 808, 811 (7th Cir. 1942):

> "It is unreasonable to think that a court with authority to issue a restraining order is without power to declare the rights of the parties in connection therewith."

[50] This question was specifically left open in *Bob Jones University*, 416 U.S. at 733, n. 7 and *"Americans United,"* 416 U.S. at 752, n. 10.

The legislative history of the Declaratory Judgment Act exclusion demonstrates that it was passed solely to reinforce, rather than expand, the Anti-Injunction Act. The Declaratory Judgment Act was initially passed in 1934, without mention of tax litigation. Some taxpayers immediately began to bring declaratory judgment actions of the kind previously barred by the Anti-Injunction Act.[51] It was this evil which Congress sought to remedy when it enacted the tax exclusion in 1935.

The Senate Report stated:

> Your committee has added an amendment making it clear that the Federal Declaratory Judgments Act of June 14, 1934, has no application to Federal taxes. The application of the Declaratory Judgments Act to taxes would constitute a radical departure from the long-continued policy of Congress (as expressed in [the Anti-Injunction Act] and other provisions) with respect to the determination, assessment, and collection of Federal taxes. Your committee believes that the orderly and prompt determination and collection of federal taxes should not be interfered with by a procedure designed to facilitate the settlement of private controversies, and that *existing procedure both in the Board of Tax Appeals and the courts affords ample remedies for the correction of tax errors.*[52]

Although there is some ambiguous language, the Report plainly indicates that the Congress was not intending to expand the Congressional policy expressed in § 7421. The new provision applied to interference with the collection of taxes, and dealt with those situations in which there were "ample remedies for the correction of tax errors."

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[51] See, *e.g.*, *Penn* v. *Glenn*, 10 F. Supp. 483 (W.D. Ky. 1935), *app. dismissed per curiam*, 84 F.2d 1001 (6th Cir. 1936); *F. G. Vogt and Sons, Inc.* v. *Rothensies*, 11 F. Supp. 225 (E.D. Pa. 1935)

[52] S. Rep. No. 1240, 74th Cong., 1st Sess. 11 (1935).

The courts have never suggested that the declaratory judgment exclusion broadened the scope of the Anti-Injunction Act. Thus, in *Allen* v. *Regents of University System of Georgia*, 304 U.S. 439 (1938) the Supreme Court permitted the Georgia Regents to challenge an excise tax paid by customers of Georgia University football games. The suit was clearly one "with respect to federal taxes." Yet even though plaintiffs specifically sought declaratory as well as injunctive relief, the Court never mentioned the Declaratory Judgment Act or indicated that the Anti-Injunction Act had been altered by Congress in 1935. Similarly, the Supreme Court in *Williams Packing*, *supra*, did not mention the Declaratory Judgment Act, although the exception which the Supreme Court permitted in that case clearly runs afoul of the bar against suits with respect to federal taxes.

In addition, there is a series of circuit court cases in which persons were permitted to sue to protect their property from tax liens levied to satisfy the obligations of other taxpayers. See, *e.g.*, *Bullock* v. *Latham*, 306 F.2d 45 (2d Cir. 1962); *Tomlinson* v. *Smith*, 128 F.2d 808 (7th Cir. 1942); *Rothensies* v. *Ullman*, 110 F.2d 590 (3d Cir. 1940). Although these were cases with respect to federal taxes, the courts did not regard the Declaratory Judgment Act as expanding the scope of the Anti-Injunction Act. Indeed, the courts continued to rely on the leading case of *Long* v. *Rasmussen*, 281 F.236 (9th Cir. 1922) decided years prior to the Declaratory Judgment Act.[53]

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[53] In *Bullock* v. *Latham*, *supra*, the Government argued that plaintiffs' suit had to be "with respect to federal taxes" since it was brought under jurisdictional statutes—28 U.S.C. § 1340 and 28 U.S.C. § 2463—expressly relating to revenue acts of the United States. The Second Circuit rejected the argument out of hand and construed the Declaratory Judgment Act in light of the narrow language of the Anti-Injunction Act.

Any doubt concerning the relationship of the Declaratory Judgment and the Anti-Injunction Acts is resolved by the history of the 1966 amendments to the Anti-Injunction Act.[54] In these amendments, Congress expressly provided for lawsuits in the third party tax lien situation. The Senate Committee Report noted that courts had been providing judicial relief in tax lien situations. It did not disapprove these decisions but stated that they should be "generalized."[55] Although clearly the tax lien suits were suits with respect to federal taxes, the Committee Report never suggested that the suits violated the Anti-Injunction Act.

Congress, after expressly providing for tax lien suits, then amended § 7421(a) to provide that no suit for the assessment or collection of taxes shall be maintained "by any person, whether or not such person is the person against whom such tax was assessed." This additional language is significant in several respects. First, the addition would have been totally unnecessary if the Anti-Injunction Act had already been broadened by the "with respect to federal taxes" language of the Declaratory Judgment Act. Second, the language Congress used—"against whom such tax was *assessed*"—confirms and reemphasizes the narrow scope of § 7421(a). Finally, if Congress had in fact intended the Declaratory Judgment Act to alter the Anti-Injunction Act, it would surely have changed the language of the Anti-Injunction Act at this time to read "with respect to federal taxes."

In sum, the exclusionary clause of the Declaratory Judgment Act does not expand the scope of the Anti-Injunction Act. Neither the Declaratory Judgment Act nor the Anti-Injunction Act are a bar to plaintiffs' lawsuit.

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[54] Federal Tax Lien Act of 1966, Pub. L. 89-719, 80 Stat. 1144.

[55] Sen. Report No. 1708 reprinted in U.S. Code Cong. and Admin. News 3722, 3750 (1966).

B. Plaintiffs' suit falls within a traditional exception to the doctrine of sovereign immunity.

In the courts below, the defendants also attempted to resurrect the widely criticized doctrine of sovereign immunity.[56] In recent decades, the Supreme Court has applied this doctrine in cases involving federal projects, property and contracts.[57] It has not applied the doctrine in cases involving the regulatory activities of federal officials. The decisions of this Court, including several relating directly to taxation, make clear that the instant case is not barred by sovereign immunity.

In *Larson* v. *Domestic and Foreign Commerce Corporation*, 337 U.S. 682 at 689 (1949), this Court reiterated that a suit could be brought against federal officials, without the consent of the United States, to enjoin actions either outside their statutory authority or performed pursuant to an unconstitutional statute.

> . . . where the officer's powers are limited by statute, his actions beyond those limitation are considered individual and not sovereign actions. The official is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are ultra vires his authority and therefore may be made the object of specific relief.

See also *Dugan* v. *Rank*, 372 U.S. 609, 621-22 (1963).

In the instant case, plaintiffs allege that defendant federal officials have exceeded their statutory authority under both the Administrative Procedure Act and the

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[56] See, *e.g.*, Jaffe, Judicial Control of Administrative Action 229 (1965); Davis, 3 Administrative Law Treatise, 545-548 (1958).

[57] See *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Malone* v. *Bowdown*, 369 U.S. 643 (1962); *Dugan* v. *Rank*, 372 U.S. 609 (1963); *City of Fresno* v. *California*, 372 U.S. 627 (1963); *Hawaii* v. *Gordon*, 373 U.S. 57 (1963).

Internal Revenue Code.[58] Thus, unless tax cases are mysteriously different from all other cases, the exception to the doctrine of sovereign immunity applies. And this Court has expressly and implicitly held that the exception to sovereign immunity applies in tax cases.

In *Georgia Railroad & Banking Co.* v. *Redwine*, 342 U.S. 299 (1952), the Court held that a suit brought to enjoin the collection of certain state taxes as violative of the Federal Constitution was not barred by sovereign immunity. Since the doctrine of sovereign immunity is essentially the same for state and federal governments, this case is applicable here. Indeed, the Court cited *Larson* v. *Domestic and Foreign Commerce Corporation*, *supra*, a federal case, both for the proposition that sovereign immunity might apply even though the suit was nominally against a state official and that it did not apply when such official was acting unconstitutionally or beyond the scope of his authority. 342 U.S. at 304 ns.12, 15.

This Court's decision in *Enochs* v. *Williams Packing and Navigation Co.*, *supra*, reaffirmed in *Bob Jones University*, *supra*, and *"Americans United,"* *supra*, also demonstrates that sovereign immunity is not a bar here. In *Williams Packing*, the Court held that, despite the express wording of the anti-injunction provision, plaintiffs could seek to enjoin Treasury's assessment and collection of taxes in certain exceptional circumstances. Since there is no statutory provision for such a suit, it is clearly an unconsented suit against the sovereign. Yet in *Williams Packing*, *Bob Jones* and *"Americans*

[58] The defendants, of course, have statutory authority to issue rulings. But they do not have statutory authority to issue rulings without regard to the procedural requirements of the Administrative Procedure Act and the substantive requirements of the Internal Revenue Code.

United," this Court obviously contemplated that such a suit could be brought.[59]

Indeed, this Court has enjoined the collection and assessment of taxes in a long line of pre-*Williams Packing* cases. See, *e.g.*, *Hill* v. *Wallace*, 259 U.S. 44 (1922); *Lipke* v. *Lederer*, 259 U.S. 557 (1922); *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498 (1932); *Allen* v. *Regents of the University System of Georgia*, *supra*. Whatever the present validity of these cases under the Anti-Injunction Act, they certainly stand for the proposition that such suits are not barred by sovereign immunity.

Louisiana v. *McAdoo*, 234 U.S. 627 (1914) is no longer valid. In part that decision appears to rest on an outdated notion of standing; the Court was concerned that a competitor was challenging the tariff rate imposed by the Treasury. 234 U.S. at 631-32. Compare *Association of Data Processing Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970). To the extent that it holds that a federal official is immune from suit when he exceeds his statutory authority, it has long been overruled.

In sum, the instant case falls comfortably within the traditional exception to the sovereign immunity doctrine. There is thus no necessity for this Court to resolve the conflict among the circuits, discussed below, on the question of whether the Administrative Procedure Act constitutes a waiver of sovereign immunity.

C. The Administrative Procedure Act constitutes a waiver of sovereign immunity.

Section 10(a) of the APA (5 U.S.C. § 702) provides that a "person . . . adversely affected or aggrieved by

[59] In *"Americans United,"* the Government expressly argued that such a suit was barred by sovereign immunity. Brief for the Petitioner, 42-44.

agency action . . . is entitled to judicial review thereof." Federal courts are specifically empowered to "compel agency action unlawfully withheld or unreasonably delayed" and to "hold unlawful and set aside agency action . . . found to be . . . an abuse of discretion, or otherwise not in accordance with law." APA § 10(e), 5 U.S.C. § 706.

On its face, therefore, the APA seems to permit suits against agency officials which might otherwise be shielded by sovereign immunity. The circuits, however, are divided on the question of whether the APA constitutes a waiver of sovereign immunity in actions to which it applies. Three circuits have held that the sovereign immunity of the United States has been waived by the APA.[60] Three circuits have refused to adopt a full-fledged waiver theory, but that nonetheless limited sovereign immunity to exceptional cases.[61] Four circuits have rejected the waiver theory outright.[62]

The Supreme Court in dictum in *Blackmar* v. *Guerre*, 342 U.S. 512, 516 (1952), stated that the APA is not "to be deemed an implied waiver of *all* governmental immunity for suit." (emphasis added). But as Professor Kenneth Davis has responded: "The Act obviously does not waive all governmental immunity from suit; the question was whether it waives such immunity to whatever extent it authorizes judicial review of administrative action." [63]

[60] See *Scanwell Laboratories* v. *Shaffer*, 424 F.2d 859 (D.C. Cir. 1970); *Kingsbrook Jewish Medical Center* v. *Richardson*, 486 F.2d 663 (2d Cir. 1973); *Estrada* v. *Ahrens*, 296 F.2d 690 (5th Cir. 1961). But see also *Warner* v. *Cox*, 487 F.2d 1301 (5th Cir. 1974).

[61] See *Schlafly* v. *Volpe*, 495 F.2d 273 (7th Cir. 1974); *Littell* v. *Morton*, 445 F.2d 1207 (4th Cir. 1971); *Washington* v. *Udall*, 417 F.2d 1310 (9th Cir. 1969).

[62] See *Sierra Club* v. *Hickel*, 467 F.2d 1048 (6th Cir. 1972), *cert. denied, sub nom. Sierra Club* v. *Morton*, 411 U.S. 920 (1973); *Motah* v. *United States*, 402 F.2d 1 (10th Cir. 1968); *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1967); *Cyans* v. *United States*, 226 F.2d 416 (1st Cir. 1950).

In its brief in *Train* v. *Campaign Clean Water, Inc.*, 420 U.S. 136 (1975), the Government attempted to brush aside the APA's clear thrust in favor of judicial review by arguing that the Act does not of itself confer jurisdiction. See Brief for Petitioner, pp. 38-39. But several circuits have held that the APA does confer jurisdiction,[64] and Judge Friendly has stated that it is "hard to see how else jurisdiction could have existed" in *Rusk* v. *Cort*, 369 U.S. 367 (1962) and *Flast* v. *Cohen*, 392 U.S. 83 (1968) unless § 10 of the APA constituted an affirmative grant of jurisdiction.[65] More significantly, courts have made clear that Congress may consent to suits against governmental officials in other ways than by enacting a jurisdictional statute. It has been held, for example, that Congress waives sovereign immunity when it includes a "sue and be sued" clause in an agency's statutory charter. See, *e.g.*, *Federal Housing Admin.* v. *Burr*, 309 U.S. 242 (1940); *Pennsylvania* v. *Lynn*, 501 F.2d 848, 851 n.11 (D.C. Cir. 1974). Thus, the APA need not confer jurisdiction in order to constitute a waiver of sovereign immunity.

Plaintiffs contend that the language of section 10 of the APA, like a "sue and be sued" clause, so strongly

[63] Davis, 3 Administrative Law Treatise 585 (1958).

[64] *Pickus* v. *United States Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1974); *Bradley* v. *Weinberger*, 483 F.2d 410 (1st Cir. 1973); *Brandt* v. *Hickel*, 427 F.2d 53 (9th Cir. 1970); *Brennan* v. *Udall*, 379 F.2d 803 (10th Cir. 1967); *Deering Milliken, Inc.* v. *Johnston*, 295 F.2d 856 (4th Cir. 1961). Two circuits have reached contrary decisions: *Zimmerman* v. *United States*, 422 F.2d 326 (3d Cir. 1970), *cert. denied*, 399 U.S. 911 (1970); *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1967).

[65] *Aguayo* v. *Richardson*, 473 F.2d 1090, 1102 (2d Cir. 1973).

presumes reviewability of official action that it must import a waiver of sovereign immunity. They urge the Court to so hold, should the Court deem it necessary to reach the issue.

D. There are no policy justifications for barring review in this case.

Defendants contended below that suits such as plaintiffs' would unduly burden the IRS and the courts. This, of course, is utter nonsense. The number of suits likely to be brought under the jurisdictional approach advanced by plaintiffs is infinitesimal compared to the massive number of refund and tax deficiency suits which the IRS and the courts now confront. Moreover, the substantive issues raised in the few non-taxpayer cases which may be brought are likely, as here, to be no different from the issues raised in refund and tax deficiency suits.[66]

On the other hand, the policy justifications for permitting suits such as plaintiffs' are substantial. Defendants' position means that any IRS tax rulings which result in benefits to taxpayers rather than burdens would be completely immunized from judicial review. Resort to the courts would be barred even in cases involving the most blatantly unconstitutional or illegal conduct.

This Court has often emphasized that the Government faces a heavy burden when it argues against reviewability.[67] The Government clearly has not met that burden here.

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[66] The question of what services hospitals must provide to be considered charitable has been before federal courts for years. See pages 20-24, *supra*.

[67] See, *e.g.*, cases cited in note 44, *supra*.

CONCLUSION

For the foregoing reasons the judgment of the United States Court of Appeals for the District of Columbia Circuit should be reversed and the case remanded.
Date: July 18, 1975

MARILYN G. ROSE
JOSEPH N. ONEK
CENTER FOR LAW AND SOCIAL POLICY
1751 N Street, N.W.
Washington, D.C. 20036
202/872-0670

Attorneys for Petitioners *
in No. 74-1110

* Counsel gratefully acknowledge the assistance of Mark A. Neubauer, law student intern at the Center for Law and Social Policy.

APPENDIX

APPENDIX

STATUTES AND REGULATIONS

Internal Revenue Code

26 U.S.C. 501

501(a) Exemption from taxation—An organization described in subsection (c) or (d) . . . shall be exempt from taxation under this subtitle . . .

501(c) List of exempt organizations—The following organizations are referred to in subsection (a):

• • • •

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual. . . .

26 U.S.C. 170

170 Charitable, etc. contributions and gifts—(a) Allowance of deduction (1) General rule. There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. . . .

• • • •

(c) Charitable contribution defined. For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—

• • • •

(2) A corporation, trust, or community chest, fund, or foundation—

• • • •

(B) Organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;

(C) No part of the net earnings of which inures to the benefit of any private shareholder or individual. . . .

26 U.S.C. 7421

7421 Prohibition of suits to restrain assessment or collection.

(a) Tax—. . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

Internal Revenue Regulations

26 C.F.R. 1.501(c)(3)-1

1.501(c)(3)-1(d) Exempt purposes—(1) In general. (i) An organization may be exempt as an organization described in section 501(c)(3) if it is organized and operated exclusively for one or more of the following purposes:

(a) Religious,

(b) Charitable,

(c) Scientific,

(d) Testing for public safety,

(e) Literary,

(f) Educational, or

(g) Prevention of cruelty to children or animals.

• • • •

(iii) Since each of the purposes specified in subdivision (1) of this subparagraph is an exempt

purpose in itself, an organization may be exempt if it is organized and operated exclusively for any one or more of such purposes. . . .

1.501(c)(3)-1(d)(2) Charitable defined. The term "charitable" is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of "charity" as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the under-privileged; advancement of religion; advancement of education or science; erection or maintenance or public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency. The fact that an organization which is organized and operated for the relief of indigent persons may receive voluntary contributions from the persons intended to be relieved will not necessarily prevent such organization from being exempt as an organization organized and operated exclusively for charitable purposes. . . ."

Administrative Procedure Act

5 U.S.C. § 551

553. Rule making

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and the nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) To interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice;

* * * *

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. . . .

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date. . . .

702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

706. Scope of review

. . . The reviewing court shall . . .

(a) hold unlawful and set aside agency action, findings, and conclusions found to be—

(a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . .

Declaratory Judgment Act

28 U.S.C. 2201

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

REVENUE RULING 56-185

Criteria or tests to be met in determining whether a hospital qualifies for exemption from Federal income tax under section 501(a) of the Internal Revenue Code of 1954 as an organization described in section 501(c)(3) thereof.

Advice has been requested concerning the criteria or tests to be met in determining whether a hospital can qualify for exemption from income tax as a public charitable organization.

Section 501(c) of the Internal Revenue Code of 1954 describes certain organizations exempt from income tax under section 501(a) and reads, in part, as follows:

> (3) Corporations, and any community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific . . . purposes, . . . and no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distribution of statements), any political campaign on behalf of any candidate for public office.

The only ground upon which a hospital may be held to be exempt under section 501(c)(3) of the Code is that it is organized and operated primarily for educational, scientific or public charitable purposes. Usually, the ground for exemption is that it is organized and operated for public charitable purposes. The Supreme Court of the United States in *Helvering* v. *Susan D. Bliss et al.*, 293 U.S. 144, Ct. D. 884, C. B. XIII-2, 191 (1934), held that the provisions of law granting exemption of income devoted to charity are liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy, and are not to be narrowly construed. Thus, in regard to hospitals and similar organizations, the Internal Revenue Service takes the position that the term "charitable" in its legal sense and as it is used in section 501(c)(3) of the Code contemplates an implied public trust constituted for some public benefit, the income or beneficial interest of which may not inure to the benefit of any private shareholder or individual.

In order for a hospital to establish that it is exempt as a public charitable organization within the contemplation of section 501(c)(3), it must, among other things, show that it meets the following general requirements:

1. It must be organized as a nonprofit charitable organization for the purpose of operating a hospital for the care of the sick. A nonprofit hospital chartered only in general terms as a charitable corporation can meet the test as being organized exclusively for charitable purposes. See *Commissioner* v. *Battle Creek, Inc.* 126 Fed. (2d) 405.

2. It must be operated to the extent of its financial ability for those not able to pay for the services rendered and not exclusively for those who are able and expected to pay. It is normal for hospitals to charge those able to pay for services rendered in order to meet the operating expenses of the institution, without denying medical care or treatment to others unable to pay. The fact that its charity record is relatively low is not conclusive that a hospital is not operated for charitable purposes to the full extent of its financial ability. It may furnish services at reduced rates which are below cost, and thereby render charity in that man-

ner. It may also set aside earnings which it uses for improvements and additions to hospital facilities. It must not, however, refuse to accept patients in need of hospital care who cannot pay for such services. Furthermore, if it operates with the expectation of full payment from all those to whom it renders services, it does not dispense charity merely because some of its patients fail to pay for the services rendered.

3. It must not restrict the use of its facilities to a particular group of physicians and surgeons, such as a medical partnership or association, to the exclusion of all other qualified doctors. Such limitation on the use of hospital facilities is inconsistent with the public service concept inherent in section 501(c)(3) and the prohibition against the inurement of benefits to private shareholders or individuals. It is recognized, however, that in the operation of a hospital there must of necessity be some discretionary authority in the management to approve the qualifications of those applying for the use of the medical facilities. The size and nature of facilities may also make it necessary to impose limitations on the extent to which they may be made available to all reputable and competent physicians in the area.

4. Its net earnings must not inure directly or indirectly to the benefit of any private shareholder or individual. This includes the use by or benefit to its members of its earnings by way of a distribution of profits, the payment of excessive rents or excessive salaries, or the use of its facilities to serve their private interests. If provision is made in the bylaws for dividends, exemption will not be allowed even though no dividends have been declared. Exemption will not be defeated, however, merely be-

cause the shareholders or members might possibly at some future date share in the assets upon dissolution in the absence of a case of mala fides where there appears to be a plan on the part of the shareholder or individual to acquire assets on the dissolution of the corporation.

A community hospital of the type supported partly by contributions from the general public and/or public grants from a city, county or state, normally meets the requirements of section 501(c)(3) as a public charitable organization. It is formed for the purpose of furnishing hospital facilities to all persons in the community at the lowest possible cost and necessarily accepts patients who are unable to pay for hospital facilities in order to retain the support of the community. A nominal charity record for a given period of time, in the absence of charitable demands of the community, will not affect its right to continued exemption. On the other hand, a hospital formed by one or more physicians in a community who may own the capital stock thereof or rent the hospital facilities to a corporation which they control requires careful study to determine whether it is being operated in part to serve their interest, directly or indirectly. See I. T. 2421, C. B. VII-2, 150 (1928).

A hospital formed to operate on a membership basis to provide, at fixed rates, prepaid hospitalization to its members is not a charitable organization within the meaning of section 501(c)(3) of the Code. Compare G. C. M. 22554, C. B. 1941-1, 243. But exemption will not be denied merely because the hospital maintains a prepayment plan, so long as such plan is available to all persons living in the area and so long as the hospital makes available its facilities to indigent as well as to pay patients to the same extent as any other hospital not operated for profit.

A hospital which is organized as required by section 501(c)(3) of the Code, but which engages primarily

in operations foreign to its stated purpose, cannot qualify as a charitable organization under that section. Conversely, a hospital, otherwise exempt, will not lose its exempt status by reason of engaging in operations unrelated to its stated purpose of such operations may be considered as merely incidental. Such a hospital will, however, be required to file an income tax return, Form 990-T, U.S. Exempt Organization Business Income Tax Return, if its gross income (included in computing unrelated business taxable income) for the taxable year is $1,000 or more.

REVENUE RULING 69-545

26 CFR 1.501(c)(3)-1: Organizations organized and operated for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals.

Examples illustrate whether a nonprofit hospital claiming exemption under section 501(c)(3) of the Code is operated to serve a public rather than a private interest; Revenue Ruling 56-185 modified.

Rev. Rul. 69-545 [1]

Advice has been requested whether the two nonprofit hospitals described below qualify for exemption from Federal income tax under section 501(c)(3) of the Internal Revenue Code of 1954. The articles of organization of both hospitals meet the organizational requirements of section 1.501(c)(3)-1(b) of the Income Tax Regulations, including the limitation of the organizations' purposes to those described in section 501(c)(3) of the Code and the dedication of their assets to such purposes.

Situation 1. Hospital *A* is a 250-bed community hospital. Its board of trustees is composed of prominent citizens in the community. Medical staff privileges in the hospital are available to all qualified physicians in the area, consistent with the size and nature of its facilities. The hospital has 150 doctors on its active staff and 200 doctors on its courtesy staff. It also owns a medical office building on its premises with space for 60 doctors. Any member of its active medical staff has the privilege of leasing available office space. Rents are set at rates comparable to those of other commercial buildings in the area.

The hospital operates a full time emergency room and no one requiring emergency care is denied treatment. The

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[1] Also released as Technical Information Release 1022, dated Oct. 8, 1969.

hospital otherwise ordinarily limits its admissions to those who can pay the cost of their hospitalization, either themselves, or through private health insurance, or with the aid of public programs such as Medicare. Patients who cannot meet the financial requirements for admission are ordinarily referred to another hospital in the community that does serve indigent patients.

The hospital usually ends each year with an excess of operating receipts over operating disbursements from its hospital operations. Excess funds are generally applied to expansion and replacement of existing facilities and equipment, amortization of indebtedness, improvement in patient care, and medical training, education, and research.

Situation 2. Hospital *B* is a 60-bed general hospital which was originally owned by five doctors. The owners formed a nonprofit organization and sold their interests in the hospital to the organization at fair market value. The board of trustees of the organization consists of five doctors, their accountant, and their lawyer. The five doctors also comprise the hospital's medical committee and thereby control the selection and the admission of other doctors to the medical staff. During its first five years of operations, only four other doctors have been granted staff privileges at the hospital. The applications of a number of qualified doctors in the community have been rejected.

Hospital admission is restricted to patients of doctors holding staff privileges. Patients of the five original physicians have accounted for a large majority of all hospital admissions over the years. The hospital maintains an emergency room, but on a relatively inactive basis, and primarily for the convenience of the patients of the staff doctors. The local ambulance services have been instructed by the hospital to take emergency cases to other hospitals in the area. The hospital follows the policy of

ordinarily limiting admissions to those who can pay the cost of the services rendered. The five doctors comprising the original medical staff have continued to maintain their offices in the hospital since its sale to the nonprofit organization. The rental paid is less than that of comparable office space in the vicinity. No office space is available for any of the other staff members.

Section 501(c)(3) of the Code provides for exemption from Federal income tax of organizations organized and operated exclusively for charitable, scientific, or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

Section 1.501(c)(3)-1(d)(1)(ii) of the regulations provides that an organization is not organized or operated exclusively for any purpose set forth in section 501(c)(3) of the Code unless it serves a public rather than a private interest.

Section 1.501(c)(3)-1(d)(2) of the regulations states that the term "charitable" is used in section 501(c)(3) of the Code in its generally accepted legal sense.

To qualify for exemption from Federal income tax under section 501(c)(3) of the Code, a nonprofit hospital must be organized and operated exclusively in furtherance of some purpose considered "charitable" in the generally accepted legal sense of that term, and the hospital may not be operated, directly or indirectly, for the benefit of private interests.

In the general law of charity, the promotion of health is considered to be a charitable purpose. *Restatement (Second), Trusts*, sec. 368 and sec. 372; IV *Scott on Trusts* (3rd ed. 1967), sec. 368 and sec. 372. A nonprofit organization whose purpose and activity are providing hospital care is promoting health and may, therefore, qualify as organized and operated in furtherance of a

charitable purpose. If it meets the other requirements of section 501(c)(3) of the Code, it will qualify for exemption from Federal income tax under section 501 (a).

Since the purpose and activity of Hospital *A*, apart from its related educational and research activities and purposes, are providing hospital care on a nonprofit basis for members of its community, it is organized and operated in furtherance of a purpose considered "charitable" in the generally accepted legal sense of that term. The promotion of health, like the relief of poverty and the advancement of education and religion, is one of the purposes in the general law of charity that is deemed beneficial to the community as a whole even though the class of beneficiaries eligible to receive a direct benefit from its activities does not include all members of the community, such as indigent members of the community, provided that the class is not so small that its relief is not of benefit to the community. *Restatement (Second), Trusts*, sec. 368, comment (b) and sec. 372, comments (b) and (c); IV *Scott on Trusts* (3rd ed. 1967), sec. 368 and sec. 372.2. By operating an emergency room open to all persons and by providing hospital care for all those persons in the community able to pay the cost thereof either directly or through third party reimbursement, Hospital *A* is promoting the health of a class of persons that is broad enough to benefit the community.

The fact that Hospital *A* operates at an annual surplus of receipts over disbursements does not preclude its exemption. By using its surplus funds to improve the quality of patient care, expand its facilities, and advance its medical training, education, and research programs, the hospital is operating in furtherance of its exempt purposes.

Furthermore, Hospital *A* is operated to serve a public rather than a private interest. Control of the hospital

rests with its board of trustees, which is composed of independent civic leaders. The hospital maintains an open medical staff, with privileges available to all qualified physicians. Members of its active medical staff have the privilege of leasing available space in its medical building. (See Rev. Rul. 69-464, page 132, this Bulletin.) It operates an active and generally accessible emergency room. These factors indicate that the use and control of Hospital *A* are for the benefit of the public and that no part of the income of the organization is inuring to the benefit of any private individual nor is any private interest being served.

Accordingly, it is held that Hospital *A* is exempt from Federal income tax under section 501(c)(3) of the Code.

Hospital *B* is also providing hospital care. However, in order to qualify under section 501(c)(3) of the Code, an organization must be organized and operated *exclusively* for one or more of the purposes set forth in that section. Hospital *B* was initially established as a proprietary institution operated for the benefit of its owners. Although its ownership has been transferred to a nonprofit organization, the hospital has continued to operate for the private benefit of its original owners who exercise control over the hospital through the board of trustees and the medical committee. They have used their control to restrict the number of doctors admitted to the medical staff, to enter into favorable rental agreements with the hospital, and to limit emergency room care and hospital admission substantially to their own patients. These facts indicate that the hospital is operated for the private benefit of its original owners, rather than for the exclusive benefit of the public. See *Sonora Community Hospital* v. *Commissioner*, 46 T.C. 519 (1966), aff'd. 397 F. 2d 814 (1968).

Accordingly, it is held that Hospital *B* does not qualify for exemption from Federal income tax under section

501(c)(3) of the Code. In considering whether a nonprofit hospital claiming such exemption is operated to serve a private benefit, the Service will weigh all of the relevant facts and circumstances in each case. The absence of particular factors set forth above or the presence of other factors will not necessarily be determinative.

Even though an organization considers itself within the scope of *Situation* 1 of this Revenue Ruling, it must file an application on Form 1023, Exemption Application, in order to be recognized by the Service as exempt under section 501(c)(3) of the Code. The application should be filed with the District Director of Internal Revenue for the district in which is located the principal place of business or principal office of the organization. See section 1.501(a)-1 of the regulations.

Revenue Ruling 56-185, C.B. 1956-1, 202, sets forth requirements for exemption of hospitals under section 501(c)(3) more restrictive than those contained in this Revenue Ruling with respect to caring for patients without charge or at rates below cost. In addition, the fourth requirement of Revenue Ruling 56-185 is ambiguous in that it can be read as implying that the possibility of "shareholders" or "members" sharing in the assets of a hospital upon its dissolution will not preclude exemption of the hospital as a charity described in section 501(c)(3) of the Code. Section 1.501(c)(3)-1(b)(4) of the regulations promulgated subsequent to Revenue Ruling 56-185 makes it clear, however, that an absolute dedication of assets to charity is a precondition to exemption under section 501(c)(3) of the Code.

Revenue Ruling 56-185 is hereby modified to remove therefrom the requirements relating to caring for patients without charge or at rates below cost. Furthermore, requirement four has been modified by section 1.501(c)(3)-1(b)(4) of the regulations.

CHART

Sample of Medium-Sized Communities Not Served by Public Hospitals

STATE	CITY [1] (POP.)	COUNTY [1] (POP.)	GENERAL HOSPITALS [2] IN COUNTY
Alabama	Selma (27,379)	Dallas (55,296)	3 Nonprofit
Arizona	Flagstaff (26,117)	Coconino (48,326)	1 Nonprofit
Arizona	Yuma (29,007)	Yuma (60,827)	1 Nonprofit 2 Federal
Arkansas	Pine Bluff (57,389)	Jefferson (85,329)	1 Nonprofit
Delaware	Wilmington (80,836)	New Castle (385,856)	3 Nonprofit
Florida	Orlando (99,006)	Orange (344,311)	6 Nonprofit 1 Public (Winter Park, Fla.)
Idaho	Idaho Falls (35,776)	Bonneville (52,457)	2 Nonprofit
Illinois	Bloomington (39,992)	McLean (104,389)	3 Nonprofit
Illinois	Peoria (126,963)	Peoria (195,318)	3 Nonprofit
Indiana	Evansville (138,764)	Vanderburgh (168,722)	3 Nonprofit
Indiana	Terre Haute (70,335)	Vigo (114,528)	2 Nonprofit
Iowa	Waterloo (75,533)	Blackhawk (132,916)	3 Nonprofit 1 Public (Cedar Falls, Ia.)
Kansas	Tokepa (125,011)	Shawnee (155,322)	3 Nonprofit
Mass.	Pittsfield (57,020)	Berkshire (149,402)	3 Nonprofit

STATE	CITY [1] (POP.)	COUNTY [1] (POP.)	GENERAL HOSPITALS [2] IN COUNTY
Michigan	Bay City (49,449)	Bay (117,339)	3 Nonprofit
Minnesota	Duluth (100,578)	St. Louis (220,693)	8 Nonprofit 1 Public (Virginia, Minn.)
Missouri	Springfield (120,096)	Greene (152,929)	4 Nonprofit
North Carolina	Asheville (57,681)	Buncombe (145,056)	3 Nonprofit 1 Federal
North Carolina	Charlotte (241,178)	Mecklenburg (354,656)	3 Nonprofit
Virginia	Alexandria (110,938)	none (indep. city)	3 Nonprofit
Virginia	Arlington (174,284)	Arlington (174,284)	2 Nonprofit
Virginia	Falls Church (10,772)	none (indep. city)	1 Nonprofit
Virginia	Fairfax (21,970)	none (indep. city)	1 Nonprofit
Washington	Spokane (170,516)	Spokane (287,487)	6 Nonprofit 2 Federal

[1] Population data are 1970 census figures from Rand McNally Premier World Atlas (1970 ed).

[2] Hospital data are from American Hospital Ass'n Guide to Health Care Field (1974 ed.). Note that the Federal Hospitals are either military, veteran or Indian facilities and therefore serve a limited sector of the community.